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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

October Term, 1986

CONSOLIDATED RAIL CORPORATION,
*Petitioner*,

*v.*

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Does the Norris-LaGuardia Act deprive federal courts of jurisdiction to enjoin secondary picketing by railroad employees?

2. Does a federal district court have jurisdiction to enjoin primary and secondary economic pressure by railroad employees pending exhaustion of the Railway Labor Act's mandatory dispute resolution procedures?

## LIST OF PARTIES

The names of the respondents are as follows: Brotherhood of Maintenance of Way Employes, O.M. Berge, W.E. LaRue, J. Dodd, J. P. Cassese, Sr., C.C. Davison, P.W. MacQueen and John Doe.

## RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner herein discloses the following subsidiaries (except wholly owned subsidiaries) and affiliates of Consolidated Rail Corporation, with the percentage of stock interest held by Petitioner noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); American Casualty Excess Insurance Company, Limited (less than 3%); The Belt Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Petitioner); Chicago & Western Indiana Railway Company (20%); Indiana Harbor Belt Railroad Company (51%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette & Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Railroad Association Insurance, Limited (9.09%); Trailer Train Company (4.88%).

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Consolidated Rail Corporation ("Conrail"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-captioned case on June 5, 1986.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 792 F.2d 303 and is reprinted in the Appendix hereto beginning at A-1.

The bench opinion of the United States District Court for the Western District of New York (Telesca, D.J.) is unreported. It is reprinted in the Appendix hereto beginning at B-1.

## JURISDICTION

Petitioner invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§1331 and 1337 to enforce the Railway Labor Act, 45 U.S.C. §§151-188, the Interstate Commerce Act, 49 U.S.C. Subchapter IV, and the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§717-718. On April 6, 1986, the district court granted petitioner's motion for a temporary restraining order and, at respondents' request, converted the order into a preliminary injunction so respondents could pursue an appeal. The court of appeals had jurisdiction of respondents' appeal of the district court's grant of a preliminary injunction pursuant to 28 U.S.C. §1292(a)(1). On June 5, 1986, the Second Circuit entered a judgment and an opinion vacating the district court's order (p. B-1, *infra*). No petition for rehearing was filed. This Court's jurisdiction to review the decision of the Second Circuit is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The Norris-LaGuardia Act, 29 U.S.C. §§101-115, the Railway Labor Act, 45 U.S.C. §§151-188, the Interstate Commerce Act, 49 U.S.C. Subchapter IV, and the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§717-718 are directly involved in this case. The relevant statutory provisions are reproduced in the Appendix hereto beginning at C-1.

## STATEMENT OF THE CASE

The Railway Labor Act ("RLA"), 45 U.S.C. §§151-188, was enacted into law in 1926 "to provide a machinery to prevent strikes" in the railroad industry. *Texas & N.O. Ry. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 565 (1930). Recognizing the crucial importance of railroads to interstate commerce, Congress imposed on all carriers and rail employees the duties "to exert every reasonable effort to make and maintain agreements concerning . . . working conditions," and "to settle *all* disputes, whether arising out of the application of such agreements, or

otherwise." 45 U.S.C. §152 First (emphasis added). These duties, the very "heart of the Railway Labor Act," are enforceable by injunction. *Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570 (1971).

To effectuate its purposes in enacting the RLA, Congress established detailed mechanisms to resolve disputes. "Minor" disputes, *i.e.*, those concerning the application or interpretation of an existing agreement, are resolved through compulsory arbitration before an adjustment board. 45 U.S.C. §153. "Major" disputes, *i.e.*, disputes over the formation of or proposed changes to a collective bargaining agreement, are resolved through negotiation, mediation, and voluntary arbitration. 45 U.S.C. §§152, 155-60. *See generally Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 725 (1945). The parties to a major dispute are not required to submit to arbitration, and may resort to self-help after the major dispute procedure is exhausted. If the use of economic weapons in connection with a major dispute threatens to deprive a section of the country of essential transportation services, the President may create an Emergency Board to investigate and report on the dispute. Neither party to a major dispute may unilaterally alter the status quo before the major dispute procedure has been exhausted. 45 U.S.C. §§152 Seventh, 155 First, 156, 160. *See generally Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

In addition to major and minor disputes, the RLA provides procedures to resolve a third category of disputes: "miscellaneous" disputes. These include those disputes between carriers and employees that are not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties (or where conferences are refused). 45 U.S.C. §155 First (b). The mediation services of the NMB may be invoked for miscellaneous disputes, and status quo duties apply until the Act's procedures are exhausted. *Id.*; 45 U.S.C. §156.

This case presents questions relating to an RLA union's use of primary[1] and secondary economic pressure against a carrier in

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1. "Primary" strike or economic pressure is used in its conventional sense of concerted action by employees against their employer, to coerce resolution

support of the union's strike against a completely unrelated carrier. On March 3, 1986, respondents Brotherhood of Maintenance of Way Employes, *et al.* ("BMWE" or "the Union"), commenced a primary economic strike against the Maine Central Railroad ("MEC") and its subsidiary, the Portland Terminal Railroad Company ("PT"), after exhausting the RLA's major dispute procedure as to those carriers. BMWE represents about 100 employees on the MEC and PT, which operate primarily in Maine. The Union later expanded its strike to include the Boston & Maine Railroad ("B&M") and the Delaware & Hudson Railroad ("D&H"), affiliates of MEC and PT, commonly owned by Guilford Transportation Industries, Inc. ("Guilford").

Conrail also operates a railroad, much larger than the MEC or the Guilford system, stretching over 13,400 miles in 15 states from Boston to Washington, D.C., and west to Chicago and St. Louis. Conrail does not connect with the MEC or PT, and is a competitor of the Guilford system for rail traffic in the northeast.[2] Like other contiguous carriers in the interstate rail system, Conrail interchanges traffic with B&M and D&H in several states, pursuant to its obligations under the Interstate Commerce Act ("ICA") (*see* n.7 *infra*).

Soon after BMWE's strike against MEC and PT began, the Union began picketing other railroads, and later threatened every railroad in the country. Conrail was among the first to feel this pressure.[3] On April 3, 1986, the Union threatened primary

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NOTES *(Continued)*

of a dispute between them. "Secondary" picketing or pressure is distinguished from primary because its coercive effects are directed against some third party who has no concern in the dispute. *IBEW v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951). *See also IBEW v. NLRB*, 366 U.S. 667, 673-74 (1961).

2. The Regional Rail Reorganization Act gives D&H the right to operate its trains over certain portions of Conrail's tracks. 45 U.S.C. §§717-718. Conrail retains ownership and control of, and conducts its own operations over, those rail lines.

3. The Union began to pressure the balance of the nation's railroads after being enjoined by Judge Telesca from proceeding against Conrail. See *Central Vt. Ry. v. Brotherhood of Maintenance of Way Employes*, 793 F.2d 1298 (D.C.

and secondary economic pressure against Conrail, stating that BMWE would ask Conrail employees whom BMWE represents to "withdraw their services," and further threatened other "economic pressure" against Conrail. The Union's expressed purpose for threatening such pressure was to "stop all forms of revenue to [Guilford]." Pursuant to the RLA, Conrail immediately sought conferences to resolve the dispute between it and the BMWE as to the level and character of services which Conrail was providing to the Guilford railroads. The BMWE refused conferences, insisting instead that Conrail cease doing business with the D&H. As provided by section 5 of the RLA, 45 U.S.C. §155, Conrail invoked the services of the National Mediation Board ("NMB"), which promptly assigned a mediator to meet with the parties.

Like other railroads, Conrail also sought injunctive relief to prevent BMWE from expanding its strike to unrelated carriers. On April 5, 1986, Conrail filed a complaint and a motion for a temporary restraining order in the United States District Court for Western District of New York. The district court issued a temporary restraining order on April 6, 1986, after hearing, enjoining the Union's economic action against Conrail (p. B-1).[4] On BMWE's request, this order was converted to a preliminary injunction so that the Union could take an interlocutory appeal.

The district court found "little doubt" that BMWE's picketing of Conrail would cause irreparable harm, and concluded that Conrail was likely to prevail on its contention that BMWE could be enjoined because it failed to exhaust the RLA's dispute resolution procedures with Conrail before changing the status

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Cir. 1986); *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employes*, 793 F.2d 795 (7th Cir. 1986), *petition for cert. filed*, No. 86-39 (U.S. filed July 15, 1986).

4. Preliminary injunctive relief was also granted in three other cases. *Richmond, F. & P.R.R. v. Brotherhood of Maintenance of Way Employes*, No. 86-3544 (4th Cir. April 12, 1986) (Widener, J.), *vacated*, (4th Cir. May 5, 1986) (by panel, with Widener, J., dissenting); *Norfolk & W.R. v. Brotherhood of Maintenance of Way Employes*, C.A. 86-191-R (W.D. Va.), *rev'd*, No. 86-3555 (4th Cir. July 11, 1986); *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employes*, C.A. 86 C 2422 (N.D. Ill.), *rev'd*, 793 F.2d 795 (7th Cir. 1986), *petition for cert. filed*, No. 86-39 (U.S. filed July 15, 1986).

quo (p. B-2). The district court reasoned that enforcement of the RLA's status quo obligation with respect to BMWE's conduct would be fully consistent with the RLA's objective of avoiding interruptions to interstate commerce (p. B-3,4).

On May 15, 1986, after oral argument on the merits of the appeal, a panel of the United States Court of Appeals for the Second Circuit granted the Union's motion for a stay pending appeal.[5]

The Second Circuit's stay precipitated a national crisis. As it had threatened, the Union immediately struck and picketed Conrail at over 80 locations across its rail system. Union agents picketed at several of Conrail's facilities. In addition, Conrail employees, who are also represented by BMWE, engaged in their own work stoppage even in the absence of pickets. As a result, Conrail's ability to provide essential transportation services was severely impaired, and the Nation's economy was endangered. The NMB determined that the Union's actions threatened substantially to interrupt interstate commerce to such a degree as to deprive a section of the country of essential transportation services, and so advised the President. Within one day of the Second Circuit's stay, President Reagan issued Executive Order No. 12,557, 51 Fed. Reg. 18,429 (May 20, 1986), appointing Presidential Emergency Board No. 209 to investigate and report upon the BMWE's dispute with MEC and PT. Pursuant to section 10 of the RLA, 45 U.S.C. §160, the appointment of the Emergency Board triggered a 60-day "cooling off period" during which strike activity ceased.

The explanatory statement accompanying Executive Order No. 12,557 underscores the national importance of this case:

> In 1985, Conrail was involved in transporting 15 percent of all traffic loaded by the Nation's railroads. In the Northeast alone, Conrail accounts for over 30 percent of all freight

5. On April 22, 1986, a different Second Circuit panel, after oral argument, had denied BMWE's motion for a stay of the district court's order pending appeal. This Court denied a similar request for an emergency stay on April 24, 1986 (per Marshall, J.).

loaded by rail. It also provides connecting service with almost all major railroads operating in the South and West. More than half of Conrail's traffic is carried in connection with other railroads, as part of joint-line movements. Over one million carloads each year move onto Conrail lines from another railroad, and close to half a million carloads are forwarded by Conrail to another railroad. *The effects of a strike against Conrail would therefore extend to most other large carriers throughout the country, even if they were not directly involved in the strike itself.*

Picketing by BMWE employees of the Conrail system, including such key points as Chicago, IL, St. Louis, MO, Cleveland, OH, Buffalo, NY, and Elkhart, IN, began on May 15, 1986. This action, if continued, could result in layoffs of 80,000 workers in key rail-served industries within the first two weeks and a total of 135,000 workers if the strike continued for a full month, in addition to the 35,000 nonmanagement employees of Conrail. *Beyond the loss of revenues to the railroad, the strike would halt production of approximately $85 million worth of goods per day and could mean layoffs of 65,000 in motor vehicles manufacturing, 30,000 in steelmaking and other primary metals production, and 10,000 each in coal mining, chemicals production, and the pulp and paper industries.* A strike against Conrail would also halt Amtrak passenger trains carrying 45,000 travelers each week — approximately 1/8 of total Amtrak intercity passengers.

22 Weekly Comp. Pres. Doc. 643 (1986) (emphasis added). However, neither the President's Executive Order nor section 10 of the RLA offered protection against renewed picketing and work stoppages after the "cooling off" period expired on July 21, 1986.

In the interim, on June 5, 1986, the Second Circuit panel that issued the stay also issued a *per curiam* opinion vacating the preliminary injunction. As support for its conclusion, the Second Circuit relied on the Norris-La Guardia Act ("N-LA"), 29 U.S.C. §§101-115. The N-LA operates to deprive federal courts of jurisdiction to issue injunctions, but only in cases "involving or

growing out of a labor dispute." 29 U.S.C. §§101, 104, 107. Moreover, the N-LA also expressly allows federal courts to issue injunctions if "unlawful acts" have been threatened or committed and will continue if not restrained. 29 U.S.C. §107(a). Although Conrail has no economic interest in BMWE's strike against the MEC and PT, and irrespective of whether the BMWE's conduct is an "unlawful act," the Second Circuit concluded that the N-LA applied to BMWE's activities and deprived the district court of jurisdiction to issue the preliminary injunction. Moreover, the court of appeals refused to accommodate the N-LA to allow enforcement of the RLA's conference and mediation requirements, reasoning that those procedures do not apply to "secondary" disputes.

The Second Circuit's rationale is substantially similar to that employed by the Fourth, Seventh and District of Columbia Circuits in three recent cases that have addressed federal court jurisdiction to enjoin BMWE's secondary picketing: *Richmond, F. & P.R.R. v. Brotherhood of Maintenance of Way Employes*, No. 86-3544 (4th Cir. July 11, 1986) (reprinted in the Appendix hereto beginning at D-1) ("*RF&P*"); *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employes*, 793 F.2d 795 (7th Cir. 1986), *petition for cert. filed*, No. 86-39 (U.S. filed July 15, 1986) ("*Burlington Northern*"); *Central Vt. Ry. v. Brotherhood of Maintenance of Way Employes*, 793 F.2d 1298 (D.C. Cir. 1986) ("*Central Vermont*"). *See also Norfolk & W. Ry. v. Brotherhood of Maintenance of Way Employes*, No. 86-3555 (4th Cir. July 11, 1986) (decided together with *RF&P*, *supra*) (reprinted in the Appendix hereto beginning at E-1). Like the Second Circuit, the Fourth, Seventh and District of Columbia Circuits have held that the RLA's mandatory dispute resolution procedures do not apply outside the context of a proximate employer/employee relationship. Similarly, those Circuits have held that the N-LA withdraws jurisdiction from the federal courts to enjoin BMWE's picketing of carriers that are not economically aligned with MEC and PT, thus rejecting the rationale employed to draw reasonable limits around trade union picketing by the Eighth Circuit in *Ashley, Drew & N. Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980), and by the Fifth Circuit in *Brotherhood of R.R.*

*Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966), upon which Conrail has relied. *See also RF&P, supra* (Widener, J., dissenting).

Emergency Board No. 209 issued its report on June 21 and the RLA's "cooling off" period expired 30 days later. The Union did not resume its strike activities, but the MEC and PT implemented its proposed changes in working conditions.[6] On August 21, 1986, President Reagan signed into law House Joint Resolution 683, which extends the RLA cooling-off period to September 18, 1986, requires the MEC and PT to rescind its recent changes in working conditions until that date, and appoints a special congressional advisory board to report on the dispute. Because of the Second Circuit's decision, Conrail has no legal protection from resumption of the BMWE's strike activity after September 18, 1986.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER SECONDARY PICKETING AGAINST A CARRIER THAT IS NOT SUBSTANTIALLY ALIGNED WITH A PRIMARY CARRIER ARISES OUT OF A "LABOR DISPUTE" WITHIN THE MEANING OF THE NORRIS-LaGUARDIA ACT.

The recent decisions of the court below and the Fourth, Seventh and District of Columbia Circuits have created a conflict among the Circuits as to whether the N-LA definition of a "labor dispute" includes picketing by a labor union against a secondary carrier that is not substantially aligned with the primary target. Resolution of this question is essential to the proper application of the N-LA in cases involving secondary picketing arising outside the Labor Management Relations Act of 1947 ("LMRA"), and thus warrants a definitive ruling by this Court.

6. According to published reports, MEC and PT reduced pay 20%, reduced health benefits 50%, and relaxed work rules limiting the contracting-out of work. 1986 Daily Labor Report (BNA) A-4 (August 25, 1986).

In *Ashley, Drew & N. Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980), the Eighth Circuit ruled that picketing by a rail union against a railroad that was not substantially aligned with the primary carrier did not arise out of a "labor dispute" within the meaning of the N-LA. The court rejected the contention that the N-LA could be read literally, noting that such a construction of the statute would lead to "absurd" conclusions. 625 F.2d at 1365. Rather, the court reasoned that the N-LA "was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interests in a labor dispute cease." 625 F.2d at 1366. After summarizing the extensive body of case law interpreting the N-LA in the RLA context, the court held that "the economic self-interest test reasonably defines the scope of the Norris-La Guardia Act's anti-injunction provisions." 625 F.2d at 1367. On the facts before it, the Eighth Circuit concluded that the Union did not have an economic self-interest in pressuring a secondary railroad which assisted the primary carrier only by interchanging traffic pursuant to its duties under the ICA.[7] The court reasoned that the secondary carrier was not providing essential services or facilities to the primary carrier, and was thus not substantially aligned with it; therefore, the union was not advancing its legitimate self-interest by the expanded picketing and no "labor dispute" for N-LA purposes was present.

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7. The ICA requires that a common carrier "provide . . . service on reasonable request." 49 U.S.C. §11101(a). *See Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, 384 U.S. 238, 244-45 (1966). This "service" includes maintenance of joint rates (49 U.S.C. §10705), continuation of trackage rights agreements (49 U.S.C. §11343), and reasonable interchange of traffic to and from connecting lines. 49 U.S.C. §10742. The ICA also prohibits discrimination in the provision of such service. 49 U.S.C. §10741. Moreover, ICA obligations run to a carrier's employees. *Minneapolis & St. L. Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126, 232 (8th Cir. 1954); *Montgomery Ward & Co. v. Northern Pac. Term. Co.*, 128 F. Supp. 475, 506 (D. Or. 1953). Accordingly, notwithstanding trade union interests, Conrail and its employees are required to continue interchange, joint rates, and trackage rights services to the D&H, Guilford's subsidiary, and may be liable for damages for breach of those duties. *Id.*; *Ashley D. & N. Ry., supra*, 625 F.2d at 1370; *Lakefront Dock & R.R. Term. Co. v. International Longshoremen's Ass'n*, 333 F.2d 549, 552 (6th Cir. 1962).

The court held that an injunction could be issued to restrain the union from picketing to coerce a violation of the ICA, because the N-LA did not apply.

The economic self-interest test also was at the heart of the Fifth Circuit's prior decision in *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 362 F.2d 649, 654-55 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). In that case, the Fifth Circuit held that "traditional economic self-interest justification concepts . . . are applicable to determine the intended scope of Norris-LaGuardia protection." 362 F.2d at 654.[8] The court concluded that the secondary carrier was substantially aligned with the primary railroad because it furnished "essential services and facilities" to the primary carrier, and therefore the union had a legitimate self-interest in pressuring the secondary carrier. On those facts, the court held that an N-LA "labor dispute" was present and that the N-LA therefore barred injunctive relief. *Id.* at 655. This Court granted certiorari and affirmed by an equally divided Court. 385 U.S. 20 (1966).

The Second Circuit, along with the Fourth, Seventh and District of Columbia Circuits, rejected the economic self-interest test on which Conrail relied, reasoning, in essence, that the only limitation on the N-LA's reach is a union's own judgment as to the scope of its legitimate self-interest. *See RF&P*, *supra*, slip op. at 12-13; *Burlington Northern*, *supra*, 793 F.2d at 805-07; *Central Vermont*, *supra*, 1300-01.[9]

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8. The Fifth Circuit relied heavily on Justice Brandeis' dissent in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472, 481 (1921), which suggests that union picketing should be protected only if it advances the union's self-interest. The Brandeis self-interest limitation was endorsed by leading proponents of the N-LA whose views this Court has relied on in interpreting the N-LA. See F. Frankfurter & N. Greene, *The Labor Injunction* (1930); *Brotherhood of R.R. Trainmen v. Toledo, P.& W.R.R.*, 321 U.S. 50, 65 (1944).

9. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982), has been cited as authority for rejection of the economic self-interest test. However, at issue in *Jacksonville Bulk Terminals* was simply whether an injunction under *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), could be issued against a strike caused by a political dispute the union had with a foreign country. This Court was not required, nor did it purport, to reach the question of what nexus between a primary labor

In short, there is a direct conflict among the Circuits in which Conrail and other railroads do business. Resolution of that conflict is essential to the administration of federal labor laws affecting railroads and other carriers governed by the RLA.[10]

## II. THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE NEED TO ACCOMMODATE THE N-LA AND THE RLA AND REGULATE ECONOMIC SELF-HELP BY RLA PARTIES.

The Second Circuit's decision is also at odds with the principles underlying this Court's decisions in *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957) ("*Chicago River*"); *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969) ("*Shore Line*"); and *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

In both *Chicago River* and *Shore Line*, this Court recognized the need to accommodate the N-LA to allow enforcement—by federal court injunctions—of the positive commands and dispute resolution procedures of the RLA. In *Chicago River*, this Court ruled that a federal court had jurisdiction to enjoin a union from striking a carrier over an RLA "minor dispute" because the RLA required such disputes to be resolved through compulsory arbitration before an Adjustment Board. The Court specifically ruled that the N-LA did not prohibit a federal court from issuing an injunction to enforce the RLA's positive commands, holding that "[t]here must be an accommodation of [the N-LA] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." 353 U.S. at 40.

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NOTES *(Continued)*

dispute and an unrelated third party in the RLA-ICA context must be shown for a union to invoke the N-LA's protections. Nor did the Court consider whether secondary picketing is a lawful self-help tool under the RLA (see Part II, *infra*). Indeed, this Court expressly reaffirmed in *Jacksonville Bulk Terminals* its prior efforts to accommodate the N-LA to paramount expressions of federal policy, including the RLA, and to allow courts to enjoin improper union conduct. 457 U.S. at 708.

10. The RLA applies to air carriers as well as rail carriers. 45 U.S.C. §181.

The Court extended the principle of *Chicago River* to RLA "major disputes" in *Shore Line*, where the Court allowed a federal court to enjoin a carrier from changing certain conditions of employment pending exhaustion of the RLA's major dispute resolution procedure (notice under section 6, negotiation and mediation), that applies when one party seeks to change working conditions. 45 U.S.C. §156.

The Second Circuit's decision conflicts with this Court's approach in *Chicago River* and *Shore Line* in its refusal to accommodate the N-LA to allow enforcement of BMWE's obligation to resolve its major and miscellaneous disputes with Conrail through the RLA's mandatory conference and mediation procedures. Disagreeing with the district court's conclusion that the Union was required to exhaust the RLA's mandatory conference and mediation procedures with Conrail before applying pressure on Conrail, the Second Circuit ruled that the RLA applies exclusively to parties in the proximate relationship of employer/employee, and to disputes between them.

In addition, the court of appeals vacated the district court's injunction even insofar as it sought to enforce BMWE's obligation as representative of *Conrail's* employees to maintain the status quo pending exhaustion of the RLA's major dispute procedure, a dispute between parties in the proximate employer/employee relationship. In this respect, the Union's status quo obligation flows from the Union's attempt to withdraw the services of all its members — including those employed by Conrail — in support of BMWE's primary strike against MEC and PT.[11] The Union's attempt to change working conditions on Conrail by calling a strike by Conrail's employees is therefore

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11. The collective bargaining agreement covering Conrail's BMWE-represented employees does not authorize Conrail's employees to refuse to perform interchange work on trains of carriers subject to a primary strike—carriers to which Conrail and its employees owe ICA duties, including the duty to interchange without discrimination. *See* cases cited n.7 *supra*. In fact, the working conditions of Conrail employees include a duty to refrain from such action even in the face of appeals by employees of other carriers who are on strike. *Brotherhood of Maintenance of Way Employes v. Conrail*, Public Law Board No. 2420, Award No. 1 (1979) (Yagoda, Arb.).

also a major dispute to which the status quo obligation attaches. *Shore Line*, *supra*. Thus, by refusing to enforce the BMWE's obligation to exhaust the RLA's major disputes procedures, the Second Circuit was in conflict with *Chicago River* and *Shore Line*.

The Second Circuit's decision is also at odds with this Court's decision in *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). In that case, while limiting the authority of states to enjoin picketing, the Court explicitly refused to rule that all labor union picketing is protected once RLA major dispute procedures are exhausted. To the contrary, the Court ruled that self-help is protected only "so long as its use conflicts with no other obligation imposed by federal law." 394 U.S. at 392. This limitation on economic self-help by RLA parties is longstanding and rooted in federal policies peculiar to the railroad industry and its labor relations. *See, e.g., Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966) (strike does not allow sweeping changes in work rules); *In re Lennon*, 166 U.S. 548 (1897) and *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 F. 730 (C.C. N.D. Ohio), *appeal dismissed*, 150 U.S. 393 (1893) (distinguishing between lawful primary rail strike, which enjoys limited privilege, and prohibited secondary pressure). *See also Brotherhood of R.R. Trainmen v. New York C.R.R.*, 246 F.2d 114 (6th Cir.), *cert. denied*, 355 U.S. 877 (1957) (enjoining primary rail strike which was neither an RLA major or minor dispute as a violation of the ICA). The decision below, however, allows the Union to use self-help in conflict with its obligations under federal laws, including the RLA, the ICA, the 3R Act and the antitrust laws, contrary to this Court's earlier decisions.

## III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The history of this litigation demonstrates that the questions presented are immensely important to the transportation industry and the Nation's economy. Prior to the decision below the Union regarded the issues as so important that it filed petitions for certiorari before judgment in *Burlington Northern* and *RF&P*, and, in the latter petition stated (prior to the decision

below in the instant case) that it was on the verge of doing so in this case. Furthermore, in stipulating to the dismissal of its petition for prejudgment certiorari in *Burlington Northern* after the Seventh Circuit decided in its favor, the Union stated that it would support the issuance of a writ of certiorari. *See Burlington Northern* Petition for Writ of Certiorari, No. 86-39, at 9 (U.S., filed July 15, 1986).

After the Second Circuit stayed the district court's injunction in this case and the Union began to pressure Conrail, the NMB concluded that the BMWE's activity threatened to deprive a substantial section of the country of essential transportation services. The very next day the President signed an executive order imposing a 60-day halt to the picketing. Thus, when the Second Circuit permitted BMWE to use the devastating economic weapons it claims are at its disposal, the President of the United States was forced to take extraordinary action to prevent a national emergency even though the primary strike involves only 100 employees in Maine. House Joint Resolution No. 683's extension of the Emergency Board's cooling-off period is further evidence of the national importance of this case, and the need for authoritative clarification of the law by this Court.

The decision below also creates an anomalous situation in American industry: secondary pressure against railroads is unlawful and enjoinable if engaged in by Labor Management Relations Act ("LMRA") employees (*Local Union No. 25, Int'l Bhd. of Teamsters v. New York, N.H.&H. R.R.*, 350 U.S. 155 (1956)), but permissible if pursued by RLA employees. An employer that is not a carrier under the RLA can obtain relief against secondary pressure by LMRA employees through the NLRB under sections 8(b)(4) and 10(1) of the LMRA, but if the secondary pressure is applied by a group of RLA employees, the employer is without remedy.[12] These results flow from the court of appeals' failure to accommodate properly the N-LA and the RLA. Therefore, if the Second Circuit's ruling is allowed to stand, a union representing employees of a small carrier in Maine will be able,

12. This occurs because the LMRA prohibitions in sections 8(b)(4) and 8(e) do not extend to employees subject to the RLA. *See* 29 U.S.C. §152(3).

through both secondary picketing and Union-ordered work stoppages by employees of secondary carriers, to shut down without sanction the operations of carriers across the country that are wholly disinterested in BMWE's primary dispute with the MEC. Furthermore, BMWE will have at its disposal in the future the power to deprive distant sections of the country of essential transportation service, again without sanction. In sum, the railroad and airline industries, and their customers and suppliers, would stand alone among America's principal industries as targets of secondary pressure if this Court were to deny review.

## IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1379—August Term, 1985

(Argued May 15, 1986 Decided June 5, 1986)

Docket No. 86-7289

CONSOLIDATED RAIL CORPORATION,

*Plaintiff-Appellee*,

—against—

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, and O. M. BERGE, President-BMWE, W. E. LARUE, Vice President-BMWE, J. DODD, General Chairman-BMWE, J. CASSESE, General Chairman-BMWE, C. C. DAVISON, General Chairman-BMWE, P. W. MACQUEEN, Assistant General Chairman-BMWE, JOHN DOE,

*Defendants-Appellants*.

Before:

KAUFMAN, CARDAMONE and WINTER,

*Circuit Judges*.

BMWE appeals from an order of the United States Court for the Western District of New York (Michael A. Telesca, *Judge*) granting Conrail's motion for a preliminary injunction enjoining BMWE from picketing Conrail.

Vacated.

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LOUIS P. MALONE, General Counsel, Brotherhood of Maintenance of Way Employees, Washington, D.C. (James L. Linsey, John S. Bishop, Michael Barrett, Cohen, Weiss & Simon, New York City, of counsel), *for Defendants-Appellants*.

DENNIS A. AROUCA, Philadelphia, Penn. (Robert S. Hawkins, Pepper, Hamilton & Scheetz, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y., Lucy S.L. Amerman, Cary A. Metz, John B. Rossi, Consolidated Rail Corporation, of counsel,) *for Plaintiff-Appellee*.

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PER CURIAM:

In April 1984, the Brotherhood of Maintenance of Way Employees ("BMWE" or the "Union") notified the Maine Central Railroad and the Portland Terminal Company that the Union wished to negotiate changes in wages and working conditions, pursuant to the Railroad Labor

Act ("RLA"), 45 U.S.C. § 151 *et seq*. After almost two years of negotiations, BMWE exhausted the elaborate bargaining procedures mandated by 45 U.S.C. §§ 155, 156. The Union subsequently commenced a lawful strike against the railroads and their parent company, Guilford Transportation Industries ("Guilford").

To enhance the bargaining position of its striking members, BMWE also sought to picket various rail carriers as secondary employers who provided direct and indirect assistance to Guilford or its subsidiaries. One such carrier was Consolidated Rail Corporation ("Conrail"). Conrail interchanges traffic with the Delaware & Hudson Railroad and the Boston & Maine Railroad, two Guilford subsidiaries.

BMWE notified Conrail of its plans by telegram. Conrail thereupon obtained a preliminary injunction from the United States District Court for the Western District of New York, enjoining the Union from commencing its picketing of Conrail. The district judge acknowledged the facial applicability of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq*., which generally deprives federal courts of jurisdiction to issue injunctive relief in labor disputes. The district court, however, believed the Union had a duty to exhaust RLA negotiation procedures with Conrail, the secondary employer, in addition to those transacted with the primary employer. Judge Telesca based his analysis on the perceived "primary purpose" of the RLA—avoidance of disruption to interstate rail transport. This expedited appeal followed. After oral argument, we stayed the injunction pending the outcome of this appeal. We now vacate the order of the district court granting the preliminary injunction.

The issue here is whether the BMWE must exhaust the virtually interminable RLA negotiation procedures with a secondary employer. We hold that the Union is under no such obligation. This supposed duty, therefore, cannot serve as a basis for an exception to the dictates of the Norris-LaGuardia Act. A contrary result would lead to the freewheeling judicial interference that the Act was meant to prevent. *See Chicago & North Western Ry. Co.* v. *United Transportation, Inc.*, 402 U.S. 570, 582 (1971) (RLA exception to Norris-LaGuardia Act must be narrowly drawn). Accordingly, we decline to remove from the Union's self-help arsenal a lawful and potent weapon—peaceful picketing. Unlike the National Labor Relations Act, 29 U.S.C. § 158(b)(4), the RLA does not ban secondary activity. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-79 (1969).

We draw support for our conclusion from the specific language of the RLA, which imposes the duty to negotiate on "carriers and the employees *thereof*." 45 U.S.C. § 152, First (emphasis added); *see generally* Note, *Judicial Approaches to Secondary Boycotts under the Railway Labor Act*, 42 N.Y.U. L. Rev. 928, (1962) ("[T]he language of the statute restricts the [Mediation] Board's jurisdiction to disputes between a carrier and *its* employees.")

More significantly, the general statutory scheme also supports our conclusion. The RLA mediation procedures are designed to be lengthy. To impose them upon secondary disputants would effectively deprive unions of the right to engage in secondary picketing, for the underlying primary dispute would often be more speedily resolved. Moreover, the RLA also provides for Presidential ap-

pointment of an emergency board to investigate a strike that threatens to disrupt substantially interstate commerce. 45 U.S.C. § 160. Congress, therefore, did not envision an active judicial role in this area.

Finally, we note that other courts have been reluctant to ignore the clear strictures of the Norris-LaGuardia Act in favor of a vague duty to negotiate not clearly expressed in the RLA. *See, e.g., Central Vermont Ry.* v. *BMWE*, No. 86-5245 (D.D.C. Apr. 25, 1986), *aff'd*, No. 86-5245 (D.C. Cir. May 14, 1986); *Richmond, F. & P. Ry.* v. *BMWE*, No. 86-3544 (4th Cir. May 5, 1986) (vacated injunction pending appeal); *Western Maryland R.R.* v. *System Bd. of Adjustment*, 465 F.Supp. 963, 968 (D.Md. 1979).

Accordingly, the order of the district court is vacated.

# APPENDIX B

THE COURT: Let the record show that it is now three p.m., and I will just read my decision into the record. I don't have a secretary. Today is Sunday, and this is the most expeditious way to get the word across, so take notes.

The plaintiff presents this motion for a temporary restraining order as part of its principal action for preliminary injunction. The matter was heard by me at eleven a.m. on Sunday, April 6, 1986.

Dennis Arouca appeared and argued on behalf of the plaintiff, Consolidated Rail Corporation, and Mr. Louis Malone appeared and argued on behalf of the defendant, the Brotherhood Of Maintenance Of Way Employees, and its officers.

Plaintiff relies upon the Railway Labor Act, 45 United States Code 152, which imposes upon a carrier and its employees the duty to resolve its disputes "with all expedition, in conference between representatives designated and authorized so to confer . . ."

The clear announced policy of the Railway Labor Act is stated in Section 152 First, and reads as follows, and I am quoting in part:

"It shall be the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The defendant union concedes that it intends to picket, and to the extent possible, interrupt the activities of the plaintiff Conrail through sympathetic action of union members employed by Conrail in connection with a strike now in existence between the union and the Maine Central Railroad.

Conrail claims this action is a violation of the Railway Labor Act, and therefore, seeks to invoke the mediation aspects of that Act and to avoid and prevent the anticipated planned picketing and ultimate interruption of its services.

The union claims that its action is a valid secondary bo cott and is not prohibited in any way by the Railway Labor Act and further, that this Court is prohibited from enjoining this activity under the Norris-LaGuardia Act, 29 United State Code Section 101, et seq.

The union argues further that although there are exceptions to the Norris-LaGuardia Act's prohibition of District Courts issuing injunctions in labor disputes, no such exception exists here in the situation of a secondary boycott.

I find that the enactment of the Railway Labor Act, 45 United States Code Section 151, et seq. is an exception to the general prohibitions of the Norris-LaGuardia Act in that Congress announces the public policy that disputes involving labor relations and railroads were to be resolved first by way of agreement and mediation so that, as clearly stated in section 151a, an of that section, "the purposes of the chapter are:

> 1) to avoid any interruption to commerce or to the operation of any carrier engaged therein;". . . and
>
> 4) of Section 151a, "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions."

In order to obtain a preliminary injunction in this Circuit, and in this instance a temporary restraining order in anticipation of that proceeding, the moving party has the burden of showing "(a), irreparable harm, and (b), either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief." The position stated clearly in Citibank N.A. against City Trust, 756 Fed 2nd 273 at 275.

There is little doubt that the irreparable injury requirement has been met. The defendants, however, argue that this Court has no jurisdiction to issue an injunction since the activities described by the plaintiff would not amount to a violation of the Railway Labor Act.

The three cases cited to me by the defendants this morning do not provide compelling support for that conclusion.

As an example, the defendants cite the case of Smith's Management against I.B.E.W. 737 Fed 2nd 788 Ninth Circuit, 1984, which holds that a secondary union activity, such as that involved here, may constitute "a labor dispute" within the meaning of the Norris-LaGuardia Act.

The parties do not deny that there is an exception to the Norris-LaGuardia Act's ban on injunctions where an injunction is necessary to enforce compliance with the requirements of the Railway Labor Act, Brotherhood of Railway Trainmen against Chicago River and Indiana Railroad Company, 353 U.S. 30, a 1957 Supreme Court case.

The case of Ashley, Drew and Northern Railway against the United States Transportation Union, 625 Fed 2nd 1357, 1980, Eighth Circuit, cited by the defendants is the only case which actually discusses the question of whether secondary picketing may be proscribed activity under the R.L.A.

The Court in that case concluded that the rationale for invoking the R.L.A. to enjoin such picketing was "not clear," to use their term, although it acknowledged that prior case law contained intimations to that effect.

The Court also recognized in that case that secondary picketing, though not expressly enjoined under R.L.A., may often tend to subvert the R.L.A.'s primary goal of avoiding interruption to the operation of the carrier.

The Eighth Circuit declined to decide whether controversies between striking employees and non-struck employers could fall within the third category of disputes covered under 46 United States Code Section 155 First (b) — a question which the Court called "not at all clear."

The Court cited some additional authority that the jurisdiction of the Mediation Board may — they use the word "may" — may well extend to only employee-employer disputes, but then added, "a more thorough examination of the R.L.A." might well reveal a basis for federal injunctive jurisdiction. That is at page 1369 of the decision.

Thus, the Ashley, Drew case cited by defendants — the only one which actually discusses the argument they advance today — on its face seems to establish plaintiff's position that there are at least sufficiently serious questions going to the merits of this action to make them a fair ground for litigation.

My review of all the cases and authorities cited to me thus far leads me to agree with that position. It is not free from doubt, however, that the secondary picketing threatened here should fall within the R.L.A.'s general provision for "any other dispute," but I find that plaintiff has clearly succeeded in demonstrating that the question is a fair ground for litigation, and that it justifies, in the words of the Ashley, Drew Court "a more thorough examination" of the scope and purposes of the R.L.A.

Indeed, I find that the plaintiff has actually succeeded in demonstrating a likelihood of success on the merits of its argument. It appears that the application of the R.L.A.'s status quo requirements in this case would be fully consistent with the Act's primary objective of avoiding interruption of commerce prior to good-faith attempts to settle disputes through mediation.

As the Second Circuit held in Air Cargo versus Local 851, 733 Fed 2nd 241, that duty extends to carriers and their employees, and may be enforced by injunction.

Accordingly, I am granting the plaintiff's motion for a temporary restraining order. I will sign it at this time, which will set forth the following conditions:

> A hearing on the preliminary injunction will be held April 14, 1986 at two p.m. here in this courthouse, indeed in this courtroom;
>
> that a copy of the complaint and the temporary restraining order shall be served upon the defendants by eleven p.m. today, April 6, 1986;
>
> that a bond be filed by the plaintiff in the sum of two hundred fifty thousand dollars to bond all costs and damages, if any, suffered by them in the event the plaintiff does not succeed in this action.

Let the record show that I am signing the temporary restraining order, and with those provisions —

MR. MALONE: Your Honor —

THE COURT: Yes.

MR. MALONE: — may I address the Court on one point? The temporary restraining order submitted by Conrail includes Potomac Yard. That was the subject of the Court's decision in Virginia which has said that we have a right to picket down there.

To do otherwise — for this Court to do so would be a collateral attack on that order.

THE COURT: Who are the parties in that decision?

MR. MALONE: The parties in that decision were Richmond, Fredericksburg and Potomac Railroad Company and the Brotherhood of Maintenance of Way Employees.

THE COURT: Is R.F. & P. of the Guilford —

MR. MALONE: No, they are not, your Honor.

THE COURT: They are not?

MR. MALONE: Not. Conrail uses the Potomac Yard as does the Delaware and Hudson.

THE COURT: I will exclude Potomac Yard, Alexandria, Virginia.

Also, if you are looking at your copy, on page 5, the very last sentence:

> "This order shall be enforced," cross out "enforced," and put in "enforceable by the United States Marshal or any other law enforcement agency or personnel with jurisdiction over the person."

Let your copy show that I am signing this at three ten p.m.

MR. MALONE: Your Honor, may I make a motion to make this a preliminary injunction so we can appeal directly to the Second Circuit?

THE COURT: Any objection?

MR. AROUCA: Yes, your Honor. We need to find out more about the other objects of the union's picketing.

We haven't conceded that the Court will not have jurisdiction under the Interstate Commerce Act.

MR. MALONE: The issue here is whether or not we can engage in secondary activity. The Court's decision says we cannot. We would like to take that immediately to the Second Circuit.

THE COURT: It's a question of law, that's a question of law.

MR. AROUCA: Well, it's a combined question of law and fact, your Honor, because —

MR. MALONE: Absolutely not.

MR. AROUCA: If I might continue. What they seek from Conrail may — may cause both Conrail and its employees to violate the Interstate Commerce Act and other laws, and therefore, may be illegal picketing because it seeks an illegal object.

And again, there's no — there's a specific exception to the Norris-LaGuardia Act for illegal acts.

MR. MALONE: Your Honor, it's a clear question of law whether or not, in fact, we can engage in secondary activity, which your order says we cannot.

THE COURT: I see it as a question of law.

MR. AROUCA: Your Honor, would the Court be retaining — would we have to go up on the Interstate Commerce Act or only on the Railway Labor Act?

THE COURT: It's a question of law. I will convert this into a preliminary injunction so that you can appeal it.

MR. MALONE: Thank you, your Honor.

THE COURT: Take a look at your copy — let me put something else together. I wasn't anticipating that move. Let me work on this a bit here.

Will you accept service of all the papers?

MR. MALONE: Yes, your Honor.

THE COURT: So that makes it easy on me.

MR. AROUCA: May I be heard on one other matter?

THE COURT: You never stop. Go ahead.

MR. MALONE: Your Honor, as for the two hundred fifty thousand dollar bond, today being Sunday — we have a five thousand dollar bond — can we receive an extension until noon tomorrow?

MR. MALONE: Your Honor, I'm — I don't want to be hard-nosed about this, but a very strong weapon of ours has just been taken from us. Either we get the bond or we picket.

MR. AROUCA: We will file the bond. It's just a question of can we have until noon tomorrow.

THE COURT: You may have until noon tomorrow to file your two hundred fifty thousand dollar bond. I think you are good for it.

Is there anything else?

MR. MALONE: No, your Honor. We're going to the Second Circuit.

THE COURT: I know you are. I want to make it easy for you. It's no threat to me, counsel.

MR. MALONE: I don't mean to threaten —

THE COURT: I encourage you to go, I encourage you to go.

Gentlemen, what I have done, I just amended my temporary restraining order with a footnote, and I will give you each a copy of this. I have had a Xerox copy run off to make it easier.

MR. MALONE: I believe under the Rules of Civil Procedure I have to ask you for a motion to reconsider and a motion to stay your order pending appeal.

THE COURT: Both are denied. So you are ripe for appeal now.

MR. MALONE: Thank you, your Honor.

THE COURT: My footnote reads as follows: Upon the defendant's motion to convert this order to a preliminary injunction, that motion is granted so that the issues raised may be appealed with dispatch.

The plaintiff may have until noon, April 7, 1986 to comply with the bond requirements of this order.

I have signed it again. So you all have a Xerox copy of it, and your work is cut out for you. I assume that you will be filing your notice of appeal immediately.

MR. MALONE: As soon as we can, your Honor.

THE COURT: Okay. So the hearing date will be I'm sure mooted. Good luck, gentlemen.

MR. MALONE: Thank you, your Honor.

THE COURT: It has been difficult and I appreciate the co-operation that I have gotten from both of you. Good luck.

* * * *

# RAILWAY LABOR ACT, 45 U.S.C. § 151 ET SEQ.

## § 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

## § 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

### Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and,

if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review*

First.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§ 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communications with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

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§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. *Arbitration—Submission of controversy to arbitration*

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed

as a violation of any legal obligation imposed upon such a party by the terms of this chapter or otherwise.

* * * *

§ 160. *Emergency Board*

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

## NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101 ET SEQ.

§ 101. *Issuance of restraining orders and injunctions; limitation; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is

being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

## § 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of

employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

## NATIONAL LABOR RELATIONS ACT, 45 U.S.C. § 151 ET SEQ.

§ 158. *Unfair Labor Practices*

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

# INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101 ET SEQ.

§ 11101. *Providing Transportation and Service*

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities. A rail carrier shall not be found to have violated this section because it fulfiills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.

§ 10705. *Authority: through routes, joint classifications, rates, and divisions prescribed by Interstate Commerce Commission*

(a)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II (except a motor common carrier of property), or III of chapter 105 of this title. When one of the carriers on a through route is a water carrier, the Commission shall prescribe a differential between an all-rail rate and a joint rate related to the water carrier if the differential is justified.

(2) The Commission may require a rail carrier to include in a through route substantially less than the entire length of its railroad and any intermediate railroad operated with it under common management or control if that intermediate railroad lies between the terminals of the through route only when—

(A) required under section 10741-10744 or 11103 of this title;

(B) one of the carriers is a water carrier;

(C) inclusion of those lines would make the through route unreasonably long when compared with a practicable alternative through route that could be established; or

(D) the Commission decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation.

The Commission shall give reasonable preference, subject to this subsection, to the rail carrier originating the traffic when prescribing through routes.

(3) The Commission may not prescribe—

(A) a through route, classification, practice, or rate between a street electric passenger railway not engaged in the

general business of transporting freight in addition to its passenger and express business and (i) a rail carrier of a different character, or (ii) a water common carrier; or

(B) a through route or joint rate applicable to it to assist a participating carrier to meet its financial needs.

(b)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title with another such carrier or with a water common carrier of property.

(2) The Commission may not require a motor common carrier of property, without its consent, to include in a through route substantially less than the entire length of its route and the route of any intermediate carrier which is operated in conjunction and under common management or control with such motor common carrier of property which lies between the termini of such proposed through routes (A) unless inclusion of such routes would make the through route unreasonably circuitous as compared with another practicable through route which could otherwise be established, or (B) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, more efficient, or more economic transportation. In prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the preceding sentence, give reasonable preference to the carrier which originates the traffic.

(c) The Commission shall prescribe the division of joint rates to be received by a carrier providing transportation subject to its jurisdiction under chapter 105 of this title when it decides that a division of joint rates established by the participating carriers under section 10703 of this title, or under a decision of the Commission under subsection (a) or (b) of this section, does or will violate section 10701 of this title. When prescribing the

division of joint rates of a rail carrier, water carrier, or motor common carrier or property under this subsection, the Commission shall consider—

(1) the efficiency with which the carriers concerned are operated;

(2) the amount of revenue required by the carriers to pay their operating expenses and taxes and receive a fair return on the property held and used for transportation;

(3) the importance of the transportation to the public;

(4) whether a particular participating carrier is an originating, intermediate, or delivering line; and

(5) other circumstances that ordinarily, without regard to the mileage traveled, entitle one carrier to a different proportion of a rate than another carrier.

(d) If a division of a joint rate prescribed under a decision of the Commission is later found to violate section 10701 of this title, the Commission may decide what division would have been reasonable and order adjustment to be made retroactive to the date the complaint was filed, the date the order for an investigation was made, or a later date that the Commission decides is justified. The Commission may make a decision under this paragraph effective as part of its original decision.

(e) When the Commission suspends, for investigation, a tariff of a rail carrier, water common carrier, or motor common carrier of property that would cancel a through route, joint rate, or classification without the consent of all carriers that are parties to it or without authorization of the Commission, the carrier proposing the cancellation has the burden of proving that cancellation is consistent with the public interest without regard to subsection (a)(2) of this section. In determining whether a cancellation involving a rail carrier is consistent with the public interest, the Commission shall, to the extent applicable—

(1) compare the distance traveled and the average transportation time and expense required using (A) the

through route, and (B) alternative routes, between the places served by the through route;

(2) consider any reduction in energy consumption that may result from cancellation; and

(3) consider the overall impact of cancellation on the shippers and carriers that are affected by it.

(f)(1) The Commission may begin a proceeding under subsection (a) or (b) of this section on its own initiative or on complaint. The Commission must complete all evidentiary proceedings to adjust the division of joint rates for transportation by a rail carrier within 9 months after the complaint is filed if the proceeding is brought on complaint or within 18 months after the commencement of a proceeding on the initiative of the Commission. The Commission must take final action by the 180th day after completion of the evidentiary proceedings, except that—

(A) when the proceeding involves a railroad in reorganization or a contention that the divisions at issue do not cover the variable costs of handling the traffic, the Commission shall give the proceedings preference over all other proceedings and shall take final action at the earliest practicable time, which in no event may exceed 100 days after the completion of the evidentiary proceedings; and

(B) in all cases other than those specified in subparagraph (A) of this paragraph, the Commission may decide to extend such a proceeding to permit its fair and expeditious completion, but whenever the Commission decides to extend a proceeding pursuant to this clause, it must report its reasons to Congress.

(2) When a carrier begins a proceeding to adjust the division of joint rates for transportation by a rail carrier under this section by filing a complaint with the Commission, the carrier must also file all of the evidence in support of its position with the complaint and, during the course of the proceeding may only file rebuttal or reply evidence unless otherwise ordered by the Commission.

(3) When the Commission receives a notice of intent to begin a proceeding to adjust the division of joint rates for transportation by a rail carrier under this section, the Commission shall allow the party filing the notice the same right to discovery that a party would have on filing a complaint under this section.

(g) When there is a shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may prescribe temporary through routes that are desirable in the public interest on its own initiative or on application without regard to subsection (f) of this section, subchapter II of chapter 103 of this title, and subchapter II of chapter 5 of title 5.

(h) Any motor common carrier of property who is a party to a through route and joint rate, whether established by such carrier under section 10703 of this title or prescribed by the Commission under subsection (b) of this section, shall promptly pay divisions or make interline settlements, as the case may be, with other carriers which are parties to such through route and joint rate. In the event of undue delinquency in the settlement of such divisions or interline settlements, such through routes and joint rates may be suspended or canceled under rules prescribed by the Commission.

§ 11343. *Consolidation, merger, and acquisition of control*

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

> (A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier

intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employee.

§ 10742.

*Facilities for interchange of traffic*

A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I or III of chapter 105 of this title shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another common carrier under either of those subchapters.

§ 10741.

*Prohibitions against discrimination by common carriers*

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or

to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

(c) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of that chapter may not subject a freight forwarder providing service subject to the jurisdiction of the Commission under subchapter IV of that chapter to unreasonable discrimination whether or not the freight forwarder is controlled by that carrier.

(d) Differences between the rates, classifications, rules, and practices of water and rail common carriers in effect for their respective types of transportation do not constitute a violation of this section or an unfair or destructive competitive practice under this subtitle.

(e) Differences between rates, classifications, rules, and practices of rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title do not constitute a violation of this section if such differences result from different services provided by rail carriers.

(f) This section shall not apply to—

(1) contracts approved under section 10713 of this title, other than as provided in subsection (d)(2)(A)(ii) and (d)(2)(B) of such section;

(2) surcharges or cancellations under section 10705a of this title;

(3) separate rates for distinct rail services under section 10728 of this title;

(4) rail rates applicable to different routes; or

(5) expenses authorized under section 10751 of this title,

except that with respect to rates described in paragraphs (2), (3), and (4), nothing in this subsection shall affect the authority of the Commission under this section with respect to rate relationships between ports or within the same port.

## The Regional Rail Reorganization Act of 1973

45 U.S.C. § 717. *Adoption of final system plan*

(a) Preliminary system plan

(1) Within 420 days after January 2, 1974, the Association shall adopt and release a preliminary system plan prepared by it on the basis of reports and other information submitted to it by the Secretary, the Office, and interested persons in accordance with this chapter and on the basis of its own investigations, consultations, research, evaluation, and analysis pursuant to this chapter. Copies of the preliminary system plan shall be transmitted by the Association to the Secretary, the Office, the Governor and public utility commission of each State in the region, the Congress, each court having jurisdiction over a railroad in reorganization in the region, the special court, and interested persons, and a copy shall be published in the Federal Register. The Association shall invite and afford interested persons an opportunity to submit comments on the preliminary system plan to the Association within 60 days after the date of its release.

(2) The Office is authorized and directed to hold public hearings on the preliminary system plan and to make available to the Association a summary and analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of the preliminary system plan, not later than 60 days after the date of release of such plan. The Office is authorized to hold public hearings on any supplement to the preliminary system plan and to make available to the Association a summary and

analysis of the evidence received in the course of such proceedings, together with its critique and evaluation of such supplement, not later than 30 days after the release of such supplement.

(b) Approval

(1) Within 120 days after January 2, 1974, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 205 of Title II and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this chapter. Within 60 days after the submission of the report by the Office, under section 715(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this chapter. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this chapter, each such court shall order that the reorganization be proceeded with pursuant to this chapter unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 205 of Title 11 and that the public interest would be better served by such a reorganization than by a reorganization under this chapter, or (2) finds that this chapter does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this chapter. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court.

(2) Whenever it has been finally determined pursuant to the procedures of paragraph (1) of this subsection, that the reorganization of a railroad subject to reorganization under section 205 of Title 11 shall not be proceeded with pursuant to this chapter, the court having jurisdiction over such railroad may, upon a petition which is filed within 10 days after February 28, 1975, by the trustees of such railroad, reconsider such order. Such reorganization court shall (i) affirm its previous order or (ii) issue an order that the reorganization of such railroad be proceeded with pursuant to this chapter unless it finds that this chapter does not provide a process which would be fair and equitable. The provisions of paragraph (1) of this subsection are applicable in such reconsideration, except that (A) such reorganization court shall make its decision within 30 days after such petition is filed, and (B) any decision by the special court on appeal from such a decision shall be rendered within 30 days after such reorganization court decision is made. There shall be no review of the decision of the special court. The Association shall take any steps it finds necessary, consistent with time limitations and other provisions of this chapter, to effectuate the consequences of such a revised order, including the preparation and submission of any necessary or appropriate supplements to the preliminary system plan.

(c) Adoption

Within 540 days after January 2, 1974, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. A copy of such submission shall be simultaneously presented to the Commission. The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan which meets all of the requirements of section 716 of this title.

(d) Review of Commission

Within 30 days following the adoption of the final system plan by the Association under subsection (c) of this section and the submission of such plan to Congress under section 718(a) of

this title, the Commission shall submit to the Congress an evaluation of the final system plan delivered to both Houses of Congress.

45 U.S.C. § 718.

*Review of commission*

(a) General

The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such period stating that it does not favor the final system plan.

(b) Revised plan

If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section

(c) Computation

For purposes of this section—

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) Additions

(1) The supplemental report, dated September 18, 1975, to the final system plan, and the provisions of the Association's official errata supplement to the final system plan, dated December 1, 1975, including all designations made therein, shall be

treated for all purposes as if they had been part of and included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall, for all purposes, be deemed to be approved as modified and amended by such supplemental report and such supplement.

(2) The Association may, upon petition of any State, modify the final system plan to make further designations with respect to rail properties of railroads in reorganization in the region designated for transfer to the Corporation under such plan, if such designations (A) are likely to result in improved rail service on such rail properties and connecting rail properties, and (B) would not materially impair the profitability of the Corporation. Such designations, including designations of such rail properties to a State, a profitable railroad, or a responsible person, may be made at any time prior to delivery of the final system plan to the special court under section 719(c) of this title. Such further designations shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress, and the final system plan shall for all purposes be deemed to be approved as modified by such designations. Any action of the Association with respect to any such petition shall not be subject to review by any court.

(3)(A) Within 20 days after February 5, 1976, the Association may, by notice to the Congress and by publication in the Federal Register, modify, supplement, or add to the designations of rail properties in the final system plan if the Association finds such actions are necessary to—

(i) achieve the efficient implementation of the final system plan, or

(ii) provide for the offer to profitable railroads of rail properties designated in the final system plan to the Corporation, if such properties are not essential in the operation of other rail properties of the Corporation but are or would be integrally related to the operation of rail properties of (or which are offered pursuant to the final system plan to) such profitable railroad, or

(iii) provide for the designation of additional rail properties to the Corporation or to a subsidiary thereof to enable the Corporation to serve efficiently a line of railroad designated to the Corporation in the final system plan if such line does not connect with any other line of railroad so designated to the Corporation or if such line would be served more efficiently as a consequence of such designation.

Any designation to a profitable railroad pursuant to this paragraph shall comply with the second sentence of section 716(d)(4) of this title, and shall only be made upon a finding by the Association that such designation is integrally related to an offer of rail properties to a profitable railroad in the final system plan, that the goals of the final system plan require that the rail properties be operated as a part of the rail properties included in such offer, and that the implementation of such designation will not materially and adversely affect the impact of such offer on the profitability of the Corporation or any profitable railroad operating in the region. Any designation to a profitable railroad pursuant to this subsection, which amends any prior offer, shall terminate 30 days after February 5, 1976, unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such amendment to the prior offer.

(B) If a line of railroad or any segment thereof is designated for rail service in the final system plan, no designation may be made by the Association pursuant to this paragraph which would result in such line or segment not being so designated. Any designations made pursuant to this paragraph shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall for all purposes be deemed to be approved as amended by such designations.

(C) Any designations made pursuant to this paragraph shall not be subject to review by any court.

(D) Any labor agreements entered into under section 778 of this title shall be subject to further negotiations for any modifications which may be necessary to implement designations made pursuant to this paragraph.

# APPENDIX D

## UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 86-3544

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RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY,

*Appellant*,

versus

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

*Appellee*.

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Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 86-352-A)

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Argued: May 5, 1986 Decided: July 11, 1986

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Before WIDENER, HALL and MURNAGHAN, Circuit Judges.

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FRED CALVIN ALEXANDER (THOMAS F. FARRELL, II; CLIFFORD R. OVIATT, JR.; BOOTHE, PRICHARD & DUDLEY; URCHIE B. ELLIS, VICE-PRESIDENT OF LAW, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY ON BRIEF) for Appellant; JOHN O'BRIEN CLARKE, JR. (HIGHSAW & MAHONEY, P.C.; LOUIS P. MALONE, III, GENERAL COUNSEL, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ON BRIEF) for Appellee.

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HALL, Circuit Judge:

Richmond, Fredericksburg and Potomac Railroad Company ("RF&P") appeals from orders of the district court denying its

motions for preliminary injunctions in this action brought against the Brotherhood of Maintenance of Way Employees (the "BMWE"). In April, 1986, RF&P filed suit against the BMWE pursuant to the Railway Labor Act (the "RLA"), seeking to enjoin the union's picketing of its facilities at Alexandria and Richmond, Virginia. The picketing occurred during the pendency of a labor dispute between the BMWE and two New England railroads regarding pay and working conditions. Following RF&P's motions for preliminary injunctions to prohibit further picketing of its Alexandria and Richmond facilities, the district court concluded that it lacked jurisdiction to award the requested relief. We affirm.

## I.

RF&P is a major railway carrier connecting the northeastern and southeastern parts of the United States. It operates two railroad yards, the Potomac Yard in Alexandria and the Acca Yard in Richmond, both of which have recently been picketed by the BMWE.

The BMWE has been involved in a labor dispute with the Maine Central Railroad Company ("MEC") and its subsidiary, the Portland Terminal Company ("PT"). The MEC and PT, together with the Delaware & Hudson Railway ("D&H") and the Boston & Maine Corporation ("B&M"), are part of the Guilford Rail System, of which Guilford Transportation Industries, Inc., is the parent corporation. After exhausting the statutory procedures of the RLA without success in resolving the dispute, the union went on strike against MEC on March 3, 1986. Later that month the BMWE extended its picketing activities to the B&M and the D&H.

On April 2, 1986, MEC and PT broke off negotiations with the BMWE. The National Mediation Board, operating under the authority of the RLA, 45 U.S.C. § 151, then recessed its public interest mediation efforts without setting a future date for negotiations. The union asserts that it decided to extend its picketing further to include RF&P's Alexandria facilities in order to

put economic pressure on the Guilford Rail System to bring MEC and PT back to the bargaining table.[1]

On April 4, 1986, the BMWE posted pickets at Potomac Yard. Employees of RF&P and four tenant railroads refused to cross the union's picket lines. RF&P immediately sought to enjoin the picketing, alleging that such activity had a serious impact on its ability to perform services for the railroads, including those which were not involved in the MEC/PT dispute. On the same day that RF&P's action was filed, the district court denied appellant's request for a temporary restraining order ("TRO") and a preliminary injunction. The district court concluded that although RF&P appeared to be a neutral, "it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with the [MEC] and [PT], which do have the underlying labor dispute and which are of the same industry." Under these circumstances, the district court found that the Norris LaGuardia Act, 29 U.S.C. § 104, deprived the court of jurisdiction to award injunctive relief.

On April 9, 1986, the union commenced picketing activity at RF&P's facilities in Richmond. The following day, RF&P returned to district court, seeking a TRO and preliminary injunction to enjoin the new picketing. Again, the district court denied relief on jurisdictional grounds.[2]

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1. According to the affidavit of William E. LaRue, international vice-president of the BMWE, filed with the district court:

> The D&H operates into plaintiff Richmond, Fredericksburg & Potomac Railroad's (RF&P) yard in Alexandria, Virginia (*i.e.*, the Potomac Yard), and obtains substantial traffic by interchange with other railroads in that yard. The BMWE has determined that it is important to the effectiveness of its strike against MEC/PT to ask D&H employees and other rail employees in the RF&P's Potomac Yard to withdraw their services from their employers in order to prevent the movement of rail cars to or from the Guilford Rail System. This action is necessary to place sufficient economic pressure upon the Guilford Rail System to convince them that it is in their economic interests to have the MEC/PT resume negotiations with the BMWE in order to resolve the disputes with this labor organization over rates of pay, rules and working conditions for employees which the BMWE represents on the MEC and PT.

2. In both instances the district court also denied injunctive relief pending appeal. RF&P then moved this Court for a stay of the district court's orders,

This appeal followed.[3]

## II.

On appeal, RF&P contends that, contrary to the district court's conclusion, a federal court has jurisdiction to enjoin the picketing of a neutral railroad emloyer in order to accommodate the mandates of both the Railway Labor Act and the Interstate Commerce Act. Appellant further argues that injunctive relief is permissible where the neutral railroad is not substantially aligned with the railroad involved in the primiary dispute with the union. We disagree with each of RF&P's contentions.

At the outset, we note that the union exhausted the procedures of the RLA and thereafter engaged in a lawful strike against the MEC/PT. Moreover, the union's secondary picketing against the RF&P has been peaceful. Absent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution. *See*

NOTES *(Continued)*

pursuant to Fed. R. App. P. 8(a). On April 12, 1986, Judge Widener, as a single judge, granted an injunction in favor of RF&P pending appeal and expedited the appeal for consideration by this panel. Brotherhood of Maintenance of Way Employees v. Richmond, Fredericksburg and Potomac R.R. Co., No. 86-3544 (4th Cir. April 12, 1986), *cert. denied*, 54 U.S.L.W. 3838-39 (U.S. June 23, 1986) (No. 85-1792). After hearing argument, the panel on May 5, 1986, entered an order dissolving the injunction pending appeal (Judge Widener dissenting).

3. After we heard argument in this case, President Reagan, acting pursuant to 45 U.S.C. § 160, issued an executive order on May 16, 1986, which convened an emergency board to investigate the dispute between the union and MEC/PT and issue a report within thirty days. 45 U.S.C. § 160 provides that in the meantime and "for thirty days after [the] board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

We find that the executive order does not make this case moot in light of the fact that the substantive dispute between the union and MEC/PT continues, and unless settled by negotiations or resolved by legislation, will be reactivated thirty days following the report to the President. Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, No. 86-1666, slip op. at 4-5 (7th Cir. June 4, 1986).

*N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Thornhill v. State of Alabama*, 310 U.S. 88 (1940). Significantly, the Supreme Court has held that in railroad disputes subject to the RLA until Congress acts, peaceful picketing in both primary and secondary situations is conduct which may not be proscribed by a state. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). The question which we must resolve in this appeal is whether a federal court may enjoin such activity.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, provides in pertientnt part that:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> > (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
> >
> > (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
> >
> > (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
> >
> > (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
> >
> > (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
> >
> > (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.

The plain language of this statute severely limits the power of a federal court to enter the labor dispute area. A case is deemed to involve or grow out of a labor dispute:

> when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

29 U.S.C. § 113(a). The Act defines "labor dispute" broadly:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). And finally,

> A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

29 U.S.C. § 113(b).

Despite the sweeping language of the Norris-LaGuardia Act, RF&P maintains that the statute cannot be viewed in isolation. According to appellant, the district court had jurisdiction to issue an injunction prohibiting the picketing at issue here in order to accommodate the Railway Labor Act and the Interstate Commerce Act and to protect the public interest in avoiding interruption of commerce. The railroad's argument, however, would have us ignore the Supreme Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982).

In *Jacksonville Bulk*, the longshoremen's union, reacting to the Soviet Union's intervention in Afghanistan, refused to load certain goods on ships bound for the Soviet Union. The employer then brought suit pursuant to the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that the union's work stoppage violated the terms of the collective-bargaining agreement which contained a no-strike clause and a provision requiring arbitration of disputes. The Supreme Court held that (1) the broad anti-injunction provisions of the Norris-LaGuardia Act apply even to politically motivated work stoppages, and (2) the work stoppage in question was not an arbitrable dispute which could be enjoined under the collective bargaining agreement. Addressing the issue of what constitutes a labor dispute, the Supreme Court found that the Norris-LaGuardia Act does not require that "each" dispute relevant to the case be a labor dispute, but merely requires that the case involve "any" labor dispute. 457 U.S. at 711. Moreover, according to the Supreme Court, the plain terms of the Norris-LaGuardia Act deprived the federal courts of the power to enjoin the union's work stoppage, precipitated by the Soviet invasion of Afghanistan, without regard to whether the union also had a nonlabor dispute with another entity. *Id.* Finally, the Supreme Court reiterated the long-standing principle that the Norris-LaGuardia Act's broad prohibition against injunctions in any labor dispute will not be constricted "except in narrowly defined situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Id.* at 708. *See also, id.* at 720.

We perceive no specific legislation or paramount congressional policy, either in the RLA or in the Interstate Commerce Act, which would support an "accommodation" exception to the anti-injunction mandate of Norris-LaGuardia, under the facts presented by this case. Appellant cannot simply rely on the general purposes of these statutes, i.e., to provide uninterrupted rail service and safe and adequate transportation, in order to supply the specific congressional policy necessary to override Norris-LaGuardia's prohibition of injunctive relief.

In *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, No. 86-1666 (7th Cir. June 4, 1986), the Seventh Circuit addressed a similar claim by Burlington Northern which sought to challenge the BMWE's secondary picketing of the railroad's Chicago facilities in connection with the same dispute at issue here involving the Guilford System railways. In concluding that the Norris-LaGuardia Act prohibited the issuance of injunctive relief, the Seventh Circuit rejected the railroad's claim under the Interstate Commerce Act:

> The Supreme Court has held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1969); *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 103 (1940).

*Id.* at 11-12. *Accord, Central Vermont Railway, Inc. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986).

Moreover, as the Seventh Circuit in *Burlington Northern* found, there is no basis for holding that the RLA of its own force authorizes injunctions against secondary picketing.[4] As long as the statutory procedures of the RLA have been exhausted and the primary strike is lawful, the Norris-LaGuardia Act applies to

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4. There is nothing in the RLA comparable to Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), which prohibits certain forms of secondary picketing by non-rail labor. *See* Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376 n.10 (1969).

prevent a federal court from enjoining the union's resort to secondary picketing. *Burlington Northern*, *supra*, slip op. at 13-23.[5]

## II.

RF&P next argues that injunctive relief is permissible under the Norris-LaGuardia Act where there is no showing that the picketed neutral railroad has aided, supported or aligned itself with the railroad involved in the primary dispute with the union. Both the Fifth and the Eighth Circuits have adopted a "substantial alignment" exception to Norris-LaGuardia. *Ashley, Drew and Northern Railways v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Brotherhood of Railway Trainmen v. Atlantic Coastline Co.*, 362 F.2d 649 (5th Cir. 1966). *See also, Western Maryland R.R. Co. v. System Board*, 465 F.Supp. 963 (D. Md. 1979). Several other circuits, however, have rejected the exception, including some which have recently done so in the context of related secondary picketing activity by the BMWE against other railroads neutral in the dispute with the MEC/PT.

5. We do not read Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co., 353 U.S. 30 (1957), or Piedmont Aviation v. Airline Pilots Association, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970), relied upon by RF&P, to dictate a different conclusion. In *Chicago River*, the Supreme Court sanctioned an injunction against a strike over a minor dispute that was pending under the RLA before the National Railroad Adjustment Board. Similarly, in *Piedmont Aviation*, this Court found that the parties had an obligation to bargain under the provisions of the RLA before going on strike. *Cf.* Boys Markets, Inc. v. Retail Clerks' Union, Local 770, 398 U.S. 235 (1970) (Norris-LaGuardia Act did not prohibit injunction where it was undisputed that grievance in question was subject to adjustment and arbitration under collective-bargaining agreement and that employer was ready to proceed with arbitration at time injunction was sought and obtained).

In the instant case, however, RLA procedures have been exhausted and, in contrast to *Boys Markets*, *Chicago River*, and *Piedmont Aviation*, there is no duty to arbitrate which could be the basis of a federal court injunction. *Cf.* Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) (*Boys Markets* exception did not apply when only the question whether a sympathy strike violated the no-strike pledge, and not the dispute that precipitated the strike, was arbitrable under the parties' collective bargaining agreement).

*Burlington Northern Railroad Co. v. BMWE*, No. 86-1666 (7th Cir. June 4, 1986); *Central Vermont Railway, Inc. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986). *See also Smith's Management Corp. v. Electrical Workers*, 737 F.2d 788 (9th Cir. 1984). RF&P urges that this Circuit adopt a "substantial alignment" exception and apply it here to permit injunctive relief. Given the expansive definition of a "labor dispute" under the Norris-LaGuardia Act and the Supreme Court's admonition to construe this term broadly, see *infra*, Part II, we see no basis for such an exception and decline to adopt it for the reasons cogently stated by the Seventh Circuit:

> Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer. . . . A court applying the "substantial alignment" test is weighing the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help — not the court — must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate.

*Burlington Northern Railroad Co. v. BMWE*, *supra* at 27-28.

## IV.

For the foregoing reasons, the orders of the district court denying preliminary injunctive relief are affirmed.

*AFFIRMED*

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

At the outset, I should call attention to the fact that the setting in which the majority places this case is copied from the remarks of the district judge during argument and an affidavit filed in the district court, both of which are to the effect that

although RF&P appeared to be a neutral it was not completely disinterested in the underlying labor dispute in that it has an association and does some business with Maine Central and Portland Terminal, which of course are in the same industry.

The problem with this fact finding on which the majority bases its opinion is that it leaves the impression that this case is a sort of substantial alignment case, though not expressed in words.

The majority does not take into account, however, and ignores two separate fact findings of the district court made in its orders of April 4, 1986 (concerning the Potomac yard) and April 10, 1986 (concerning FR&P's Richmond facility). The April 4th order finds that RF&P is "a neutral," and the April 10th order also finds that RF&P is "a neutral," and "there is no showing that any such picketing will result in any economic impact on the . . . [union]." This fact finding in an order of the court must be accepted rather than the remarks of the judge and the affidavit filed in the district court. We have addressed this subject on two occasions and held in each that a court speaks through its judgments and orders. If the order of the court is contrary to an observation made by the judge in the transcript, and of course that would apply to the affidavit in this case also, it is the order which controls. *Murdaugh Volkswagen v. First Nat. Bank of S.C.*, F.2d 41 (4th Cir. 1984); *Segars v. Atlantic Coastline RR Co.*, 286 F.2d 767 (4th Cir. 1961).

Far from arguing, as does the majority, that there may be some kind of tangential substantial alignment, the union embraces the district court's fact finding and takes the position that it may picket any railroad in the United States whether or not the picketed railway has any connection with the union or with the strike in Maine or with the parties to the strike in Maine. In other words, the union insists on its right to picket a neutral, as RF&P has been found to be.

I believe that the substantial alignment test of *Ashley, Drew*[1] should be applied in this case to give a federal court ju-

1. *Ashley, Drew & Northern Ry. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980).

risdiction to enjoin BMWE's picketing of the RF&P's railroad yards. I also disagree with the majority's conclusion that *Jacksonville Bulk Terminals* requires that we ignore the public interest of avoiding interruption of commerce. Under the majority's interpretation of the Norris-LaGuardia Act, 29 U.S.C. § 104, et seq., BMWE can engage in picketing of any railroad facility in the country regardless of its complete disassociation from the underlying strike in Maine. I believe that such an overly broad construction of the Norris-LaGuardia Act fails to properly accommodate with the Norris-LaGuardia Act the purposes of the Railway Labor Act, 45 U.S.C. 151, et seq., and the Interstate Commerce Act, Title 49 U.S.C., esp. Ch. 111.

I disagree with the majority's broad reading of *Jacksonville Bulk Terminals*.[2] In that case, the Supreme Court was asked to decide the power of a federal court to enjoin a labor dispute based upon a politically motivated work stoppage. The fact there was that the union refused to provide labor to the employer to handle cargo bound to, or coming from, the Soviet Union, or carried on Russian ships. The cause of the union's action was the Soviet intervention in Afghanistan. The Court held that a federal court did not have jurisdiction under the Norris-LaGuardia Act to enjoin the work stoppage because the underlying dispute was not arbitrable under the terms of the collective bargaining agreement. The Court was concerned only with the reach of those anti-injunction provisions as they related to what was obviously and in fact a labor dispute but which was based on political motives. The court was not called upon to rule on Norris-LaGuardia's applicability absent a labor dispute. Nor was it called upon to consider any accommodation between Norris-LaGuardia and the Railway Labor Act. See *Trainmen v. Chicago R & I R Co.*, 353 U.S. 30, 40 (1957). *Jacksonville Bulk Terminal* did, however, recognize that exceptions to Norris-LaGuardia can exist "where necessary to accommodate [that] Act to specific federal legislation or paramount congressional policy." Id. at 708. "There must be an accommodation of . . . [the

2. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982).

Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *Trainmen* at 40.

Such congressional policy is found in the Interstate Commerce Act and the Railway Labor Act itself as expressed policy against interference with the flow of interstate commerce.

I believe that *Railroad Trainmen v. Terminal Co.*, 394 U.S. 69 (1969), is more nearly on point to the issues at hand than is *Jacksonville Bulk Terminals* because *Railroad Trainmen* dealt directly with the Railway Labor Act and its relation to the Norris-LaGuardia Act which, as I have noted, *Jacksonville Bulk Terminals* did not. In *Railroad Trainmen*, the Court concluded that state law was preempted and that the Railway Labor Act permitted unions to employ a range of peacefully economic power, "so long as its use conflicts with no other obligation imposed by federal law." Id. at 392. That federal law is the prohibition against interference with interstate commerce. I disagree with the majority's conclusion that such a broad congressional policy is not enough to support accommodation between the Railway Labor Act, the Interstate Commerce Act and the Norris-LaGuardia Act. Slip op. at 10. By rejecting the basic principles governing the free flow of commerce, the majority allows the BMWE to bring the nation's entire rail system to a halt because of a labor dispute it has with a small railroad in New England.

I believe that the Eighth Circuit's approach in *Ashley, Drew* is a far more reasonable method in striking harmony in this area of the law. Also in accord is *Brotherhood of Railroad Trainmen v. Atlantic Coastline Co.*, 362 F.2d 649 (5th Cir.), affirmed by an equally divided court, 385 U.S. 20 (1966). *Ashley, Drew* teaches that Norris-LaGuardia's anti-injunction provisions cannot be reasonably applied without looking at both the character of the parties and the subject matter of the dispute. Id. at 1365. After reviewing a long line of precedents, the Eighth Circuit concluded that

> it is reasonable to conclude that Section 13(a) [of Norris-LaGuardia, 29 U.S.C. 113(a)] was meant to preclude injunctive interference with bargaining or organizing on an

> industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield to union activities beyond the place where the union's interest in a labor dispute ceases."

*Ashley, Drew* at 1366.

In order to fall within the scope of Norris-LaGuardia's anti-injunction provisions, the union must show that the picketed company is substantially aligned with the company involved in the underlying labor dispute. In the case before us, BMWE has shown no substantial alignment between RF&P and the Maine Central. The district court twice found that the RF&P is "a neutral." I would adopt the reasoning of *Ashley, Drew* and would allow federal court intervention under the facts of this case. I think application of the Norris-LaGuardia Act is inappropriate here because the picketing of RF&P's yards does not involve or arise out of the only possible labor dispute in this record: the dispute between the BMWE and the Maine Central in Maine.

Because the RF&P is not substantially aligned with the Maine Central and has no dispute with Maine Central, labor or otherwise, I would reverse the order of the district court declining to enjoin picketing at railway facilities having no connection whatsoever with the labor dispute in Maine.

The requirements of time (this dissent is transmitted by facsimile to our clerk's office for filing) prevent a more extended discussion of this most interesting and close question. In this respect, I should add that I especially rely upon the reasoning, as did *Ashley, Drew* to some extent, in the treatise *Labor and the Law*. Gregory & Katz (3d ed.) Ch. VII, especially p. 184, et seq.

# APPENDIX E

## UNITED STATES COURT OF APPEALS

### FOR THE FOURTH CIRCUIT

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No. 86-3555

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NORFOLK AND WESTERN RAILWAY COMPANY; SOUTHERN RAILWAY COMPANY; THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; THE NEW ORLEANS TERMINAL COMPANY; GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY; ST. JOHNS RIVER TERMINAL COMPANY; CENTRAL OF GEORGIA RAILROAD COMPANY; GEORGIA NORTHERN RAILWAY COMPANY; LIVE OAK, PERRY AND SOUTH GEORGIA RAILWAY COMPANY; TENNESSEE RAILWAY COMPANY; TENNESSEE, ALABAMA & GEORGIA RAILWAY COMPANY; ATLANTIC AND EAST CAROLINA RAILWAY COMPANY; CAROLINA AND NORTHWESTERN RAILWAY COMPANY; INTERSTATE RAILROAD COMPANY,

*Appellees*,

*versus*

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, O. M. BERGE, PRESIDENT; J. W. PUGH, GENERAL CHAIRMAN; T. R. MCCOY, VICE GENERAL CHAIRMAN; G. L. HOCKADAY, GENERAL CHAIRMAN; WILLIAM MCWREATH, GENERAL CHAIRMAN; J. L. D'ANNIBALLE, GENERAL CHAIRMAN; SOL HAMMONS, GENERAL CHAIRMAN; D. E. DELOACH, GENERAL CHAIRMAN; M. A. CHRISTIE, INTERNATIONAL VICE PRESIDENT; B. L. HALL, INTERNATIONAL VICE PRESIDENT; W. E. LARUE, INTERNATIONAL VICE PRESIDENT,

*Appellants*.

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E-2

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (C/A 86-191-R)

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Argued: June 2, 1986 Decided: July 11, 1986

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Before WIDENER, HALL, and PHILLIPS, Circuit Judges.

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JOHN O'BRIEN CLARKE, JR. (THOMAS P. MURPHY; HIGHSAW & MAHONEY, P.C.; GARY E. TEGENKAMP; FOX, WOOTEN & HART; LOUIS P. MALONE, III, GENERAL COUNSEL, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ON BRIEF) for Appellants; WILLIAM B. POFF (W. FAIN RUTHERFORD; D. STAN BARNHILL; FRANK K. FRIEDMAN; WOODS, ROGERS & HAZLEGROVE; RICHARD A. KEENEY, GENERAL COUNSEL, LAW DEPARTMENT, NORFOLK SOUTHERN CORPORATION ON BRIEF) for Appellees.

HALL, Circuit Judge:

The Brotherhood of Maintenance of Way Employees, as well as certain of its officers and members (the "BMWE" or the "union"), appeal from an order of the district court preliminarily enjoining the union from picketing facilities of the Norfolk & Western Railway Company. We reverse.

In April, 1980, the Norfolk and Western Railway Company and other affiliated railroads ("N&W") filed suit against the BMWE under the Interstate Commerce Act and Railway Labor Act, seeking to enjoin the union's picketing of the railroad's facilities near Bellevue, Ohio.[1] The picketing occurred during the pendency of a labor dispute which the union had with the Maine Central Railroad Company ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), as well as with other rail carriers in the Guilford Rail System.

The district court granted N&W's motion for a preliminary injunction, concluding that there was no substantial alignment

1. This suit was brought in the Western District of Virginia, the judicial district in which N&W maintains its corporate headquarters.

between N&W and the MEC/PT or the Guilford Rail System and no labor dispute within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §§104 and 113, which would justify the union's secondary picketing of N&W's facilities. This appeal followed.[2]

On appeal, the BMWE contends that the district court lacked jurisdiction to enjoin its picketing of N&W's facilities under the Norris-LaGuardia Act. In a related case decided today, *Richmond, Fredericksburg, and Potomac Railroad Co. v. Brotherhood of Maintenance of Way Employees*, ____F.2d ____, No. 86-3544 (4th Cir. _____, 1986),[3] we fully considered the questions presented in this appeal and resolved them in favor of the union. Accordingly, for the reasons stated in Parts II and III of that opinion, we reject the position advocated by N&W,[4] reverse the district court's order, and remand the case with instructions to dismiss the complaint for lack of jurisdiction.

*REVERSED AND REMANDED WITH INSTRUCTIONS.*

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissent filed today in the related case, *Richmond, Fredericksburg, and Potomac Railroad Co. v. Brotherhood of Maintenance of Way*

2. In conjunction with its appeal, the union moved this Court for summary reversal or, in the alternative, for a stay of the district court's order. Following briefing and oral argument, we granted the request for a stay pending full consideration of the appeal.

3. The *Richmond, Fredericksburg* case involved the BMWE's secondary picketing of another railroad in the context of the union's same dispute with the MEC/PT.

4. N&W relies on the same arguments in the instant appeal as did the railroad in *Richmond, Fredericksburg*. In addition, N&W asserts that under the Railway Labor Act ("RLA") the BMWE has a duty to bargain with the railroad over whether the union may engage in secondary picketing. We reject that contention as meritless. The RLA does not ban the union's resort to peaceful secondary picketing and we are unwilling "to ignore the clear strictures of the Norris-LaGuardia Act in favor of a vague duty to negotiate not clearly expressed in the RLA." Consolidated Rail Corporation v. Brotherhood of Maintenance of Way Employees, No. 86-7289, slip op. at 6 (2d Cir. June 5, 1986). *Accord*, Central Vermont Railway, Inc. v. BMWE, No. 86-5245, slip op. at 7-11 (D.C. Cir. June 27, 1986).

*Employees*, ____F.2d ____, No. 86-3544 (4th Cir. July 11, 1986).

I would affirm the district court's grant of a preliminary injunction following its conclusion that there was no substantial alignment between N&W and the Maine Central.

Supreme Court, U.S.
FILED
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CLERK

No. 86-353

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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CONSOLIDATED RAIL CORPORATION,
*Petitioners*

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
*Respondents*

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## BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF CONSOLIDATED RAIL CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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## BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF CONSOLIDATED RAIL CORPORATION'S PETITION FOR A WRIT OF CERTIORARI *

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### INTRODUCTION

The Petitioner and *Amicus Curiae*, the National Railway Labor Conference, urges the Court to grant the Consolidated Rail Corporation's ("Conrail") Petition for a Writ of Certiorari. A local labor dispute involving approximately 110 employees of the Maine Central Railroad and the Portland Terminal Company ("MEC/PT") has given rise to a legal issue of profound national importance as well as numerous lawsuits involving most of

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* Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

the large railroads in the United States. At the present time, the Court has pending before it at least two Petitions for a Writ of Certiorari relating to the scope of lawful union economic action during a labor dispute in the railroad industry. *See Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes*, Docket No. 86-39, July 15, 1986, and *Norfolk and Western Railroad Co. v. Brotherhood of Maintenance of Way Employes*, Docket No. 86-175, August 1, 1986. *Amicus* National Railway Labor Conference has filed an *amicus* brief in support of the *Burlington Northern* Petition and supports the Petition of the Norfolk and Western Railroad. The National Railway Labor Conference is filing the present brief in support of Conrail's Petition because it believes the questions raised by the Petition are intrinsically important and because the factual matrix of the legal issues is somewhat different from those in the *Burlington Northern* and *Norfolk and Western* cases. The Court's consideration and resolution of the legal issues raised by the Petitions would be aided by coordinated consideration of the *Burlington Northern* and *Conrail* cases.

The Conference respectfully submits that the BMWE's escalation of its primary labor dispute with MEC/PT has given rise to numerous lawsuits that, in turn, have created uncertainty about the legal limits of economic self-help in a railway labor dispute. The litigation also implicates the injunctive power of the federal judiciary to vindicate the objectives of the Railway Labor Act and related legislation. The prevailing uncertainty is manifested by a split among the federal courts of appeal, which cannot agree upon the intention of Congress regarding secondary boycotts under the Railway Labor Act. The need for a definitive interpretation of the Railway Labor Act and its relationship to the Norris-LaGuardia Act are issues of first importance to rail carriers, the labor organizations that represent their employees, and

the public that depends on rail transportation. Until the questions presented by this case are answered, the railroad and airline industries will operate in a state of uncertainty that will disrupt ongoing collective bargaining and may imperil labor relations stability.

## INTEREST OF AMICUS CURIAE

Virtually all of the nation's Class I railroads are members of the National Railway Labor Conference ("NRLC" or "Conference"). The Conference is the multiemployer representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for labor relations information and advises and assists its member railroads about the system established by the Railway Labor Act to adjust disputes arising out of workplace grievances or the interpretation of collective bargaining agreements.

The Conference requests that the Court grant the instant Petition and respectfully submits that its statement in support is desirable because it will more fully apprise the Court of the nationwide impact of the issue before it. The Conference's participation will also more fully inform the Court of the danger posed by Respondent's picketing to the national transportation system and the economy which depends upon it for survival.

## BACKGROUND

The Brotherhood of Maintenance of Way Employes ("BMWE") represents approximately 110 active railroad workers employed by Maine Central Railroad ("MEC") and the Portland Terminal Co. ("PT"), small local rail carriers located in Maine. The BMWE contract with MEC/PT reopened in 1984, and the parties began negotiations aimed at a new contract covering

rates of pay, rules and working conditions. By March 3, 1986, the parties had exhausted the major dispute resolution procedures of the Railway Labor Act. The BMWE commenced a lawful strike against the carrier, and later, its corporate affiliates, the Boston & Maine ("B&M") and the Delaware & Hudson ("D&H") railroads. The BMWE was unable to force MEC to capitulate through its use of a primary strike.

In the spring of 1986, the BMWE attempted to ratchet up the pressure on the MEC/PT by pressuring third-party, neutral employers in an admittedly secondary campaign of economic warfare. Conrail was among the early railroads to experience secondary economic action. On April 3, 1986, the Union threatened economic pressure against Conrail stating that the BMWE would ask Conrail employees whom the BMWE represented to "withdraw their services" and further threatened other "economic pressure" against Conrail. The Union's express purpose for threatening such pressure was to "stop all forms of revenue to [Guilford[1]]." The Union insisted that Conrail cease doing business with the D&H, an affiliate of the Maine Central Railroad. Conrail Petition, pp. 4-5.

Faced with a substantial threat, Conrail sought conferences with the BMWE to resolve the dispute. The Union refused, and Conrail thereafter invoked the services of the NMB under Section 5 of the Act. Conrail Petition, p. 5. Conrail also filed a complaint in the United States District Court for the Western District of New York and a motion for a temporary restraining order. The motion was granted on April 6, 1986. The BMWE was enjoined from engaging in economic action against Conrail. The temporary restraining order was converted to a preliminary injunction and appealed to

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[1] Guilford Transportation, Inc. is the parent corporation of MEC, PT, B&M, and D&H.

the United States Court of Appeals for the Second Circuit. On May 15, 1986, the Court of Appeals granted the Union's motion for a stay pending appeal, and within twenty-four hours, the BMWE struck and picketed Conrail at eighty locations across its rail system. Union agents picketed several Conrail facilities and, even where there was no picketing, Conrail employees represented by the BMWE responded to the Union's call to pressure Conrail by engaging in work stoppages in support of the Union's position in the MEC/PT dispute. Conrail Petition at p. 6. On the following day, President Reagan issued Executive Order No. 12,557, 51 Fed. Reg. 18,429 (May 20, 1986) appointing Presidential Emergency Board No. 209 to investigate and report on the BMWE's dispute with the MEC and PT, pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160.

An explanatory statement accompanying Executive Order No. 12,557 made the following observations about the secondary economic action directed against Conrail. Picketing by BMWE employees of the Conrail system

> . . . began on May 15th, 1986. This action, if continued, could result in layoffs of 80,000 workers in key rail-served industries within the first two weeks, and the total of 135,000 workers if the strike continued for a full month, in addition to the 35,000 nonmanagement employees of Conrail. Beyond the loss of revenues to the railroad, the strike would halt production of approximately $85 million worth of goods per day and could mean layoffs of 65,000 in motor vehicles manufacturing, 30,000 in steelmaking and other primary metals production, and 10,000 each in coal mining, chemicals production, and the pulp and paper industries. A strike against Conrail would also halt the Amtrak passenger trains carrying 45,000 travelers each week—approximately one-eighth of total Amtrak intercity passengers.

22 Weekly Comp. Pres. Doc. 643 (1986).

On June 5, 1986, the United States Court of Appeals for the Second Circuit issued a *per curiam* opinion vacating the preliminary injunction ruling that the Norris-LaGuardia Act applied to the Maintenance of Way Employes activities against Conrail and deprived the District Court of jurisdiction to issue a preliminary injunction. The court concluded that the Railway Labor Act's resolution procedures for major and miscellaneous disputes were not applicable to the Union's economic action directed at Conrail.

Emergency Board No. 209 issued its Report on June 21, 1986, and the Railway Labor Act's cooling off period expired thirty days later. On August 21, 1986, President Reagan signed into law House Joint Resolution 683 (Public Law 99-385) which extended the Railway Labor Act's cooling off period to September 18, 1986, and, *inter alia*, appointed a Special Congressional Advisory Board to report on the dispute.

Thereafter, on September 23, 1986, the House adopted Senate Joint Resolution 415 which provided that the report and recommendations of Presidential Emergency Board 209 be binding on the parties and have the same effect as though arrived at by agreement. The Joint effect as though arrived at by agreement. The President signed the legislation on September 30, 1986.[2]

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[2] The passage of legislation resolving the narrow dispute that was the subject of the Emergency Board proceeding does not moot the controversy between Conrail and the BMWE about the lawfulness under the Railway Labor Act of secondary economic action. Collective bargaining in the railroad industry is influenced by the perception of economic force and the prospects for legislative action in the event an agreement cannot be reached. Thus, the dispute between Conrail and the BMWE continues both in the context of their own collective bargaining and as unwilling participants in the disputes of other rail carriers and labor organizations. In all but the most extraordinary case, the particular underlying dispute would be resolved by agreement, capitulation or legislation before the Supreme Court would have an opportunity to determine the

## THE DECISION OF THE COURT OF APPEALS WILL DESTABILIZE LABOR RELATIONS IN THE RAILROAD INDUSTRY

The Railway Labor Act and the judicial precedent interpreting its provisions reflect a substantial accommodation of the principle of free collective bargaining to the ultimate goal of labor peace in the economically vital rail-transportation industry. In *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969), the Court observed that Congress sought to avoid rail labor strikes by designing a collective bargaining process that was "almost interminable." The tilt of this accommodation is further reflected in the occasions where Congress has had to intervene to restore or preserve vital rail services against a strike that imperils the rail system. *See, e.g.*, 128 Cong. Rec. H.7382 (Sept. 22, 1982) (summary of rail strike legislative intervention); *Brotherhood of Loc. Firemen & Engineers v. Chicago B. & Q. R. Co.*, 225 F. Supp. 11, 21-23 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964).

The Court has inferred a prohibition against self-help when the underlying dispute can be resolved through the grievance procedure. *See Brotherhood of R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957). It has also inferred a prohibition against economic action where the labor organization has not exhausted the statute's collective bargaining procedures or bargained in good faith. *Chicago & N.W. R.R. Co. v. United Transp. Union*, 402 U.S. 570 (1971). These restrictions are not intended to be punitive. Rather, they reflect a strong bias against the disruption that inevitably accompanies the exercise of economic force in a rail labor dispute. The Railway La-

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lawfulness of the secondary economic action. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). *See generally* Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L.Rev. 373 (1974).

bor Act itself, and the Court when it has been called upon to interpret the statute, has almost invariably opted for stability rather than economic strife, and a policy constraining the use of self-help, even after RLA procedures have been exhausted. *Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966).

The decision of the Court of Appeals below conflicts with the decisions of this Court and the goals of the Railway Labor Act. The collective bargaining relationship between the carrier, and its employees and their labor representatives exists before, during and after the period of self-help. The maintenance of that relationship is a statutory interest patently more important than the policy authorizing "economic warfare." The Court recognized the need to weigh these interests in *Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, *supra*, and resolved the matter by removing certain economic weapons from the parties' arsenals.

In its decision in the *Conrail* litigation, the Court of Appeals incorrectly relied on *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), as authority permitting secondary action in an RLA dispute. This important issue was not clearly before the Court in *Jacksonville Terminal*, and the Court of Appeals' extrapolation of the Court's opinion in that case is at odds with the Court's traditional exegesis of the Railway Labor Act.

The *Conrail* case should be heard with the *Burlington Northern* petition because *Conrail* presents a factual record that more clearly illustrates the interaction of the secondary action and the labor relations of the secondary employer. The BMWE represents the maintenance-of-way workers on the Conrail property. The history of this dispute reflects that representatives of the Union arranged for picketing at Conrail facilities. Even at sites where there was no picketing, "Conrail employees, who are also represented by BMWE, engaged in their own work stoppage . . . ." Conrail Petition, p. 6. This was

consistent with earlier BMWE threats that the Union "would ask Conrail employees whom BMWE represents to 'withdraw their services.'" Conrail Petition at p. 5.

The Conrail situation illustrates the important point that secondary economic action in the railroad industry takes more forms than "stranger picketing" and "employees' decisions to honor picket lines." The hegemony of certain labor organizations[3] throughout the railroad industry transforms the characteristics of secondary activity from mere "stranger picketing" to include a "labor dispute on the secondary carrier, implicating the RLA dispute resolution procedures of conference and mediation under Sections 2 and 5." The Union rejected conference and mediation. Conrail Petition, p. 8. The decision of the Court of Appeals leaves this secondary labor dispute unregulated and uncontrolled, an outcome at odds with the purposes of the Railway Labor Act and the decisions of this Court. 45 U.S.C. § 151(a). This Court uniformly has approved the use of injunctions to enforce RLA dispute resolution procedures of conference and mediation. *See Chicago & N.W.*, *supra* p. 7; *Detroit & T.S.L.*, *supra* p. 7; *Texas & N.O. R.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930).

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[3] 49th Annual Report, National Mediation Board, pp. 38-39 (1983).

## CONCLUSION

For the foregoing reasons, *Amicus Curiae* National Railway Labor Conference urges that the instant petition be *granted.*

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*Respondents.*

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

## PETITIONER'S SUPPLEMENTAL AND REPLY MEMORANDUM

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For The Second Circuit

## PETITIONER'S SUPPLEMENTAL AND REPLY MEMORANDUM

Petitioner Consolidated Rail Corporation ("Conrail") files this supplemental and reply memorandum to address the response to its petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Conrail Petition") and the amicus brief in support of the petition by the National Railway Labor Conference ("NRLC"). The memorandum also addresses other developments that occurred since the petition was filed on September 2, 1986, which may affect the Court's consideration of the petition.

1. *Public Law No. 99-431.* On September 30, 1986, President Reagan signed into law a joint resolution adopted by Congress (a copy of which is set forth beginning at page A-1), to resolve the primary labor dispute between respondents Brotherhood of Maintenance of Way Employes, *et al* ("BMWE" or "Union") and the Maine Central Railroad and Portland Terminal Company, which dispute had led to the economic pressure on Conrail that forms the basis for this case. In a case growing out of the same primary labor dispute and similar economic pressure, *Burlington Northern Railroad Company v. Brotherhood of Maintenance Way Employes* (U.S. No. 86-39) ("*Burlington*"), both petitioner and respondent addressed the question of whether the enactment of Public Law No. 99-431 rendered that case moot. Both parties contended the case was not moot because the underlying dispute was one "capable of repetition, yet evading review", citing *inter alia*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125 (1974). On October 8, 1986 the Court granted certiorari in *Burlington*.

Conrail submits that the same reasons advanced in No. 86-39 as to the effect of Public Law No. 99-431 on the petition apply in the instant case. The same primary labor dispute is involved and, although the type and character of union pressure in the instant case make it different from *Burlington* (discussed *infra*), the same observations as to the brevity of strikes, their likelihood to recur and their effect on complete judical review apply here, and warrant granting Conrail's petition. This same view was expressed in the Amicus Brief of the NRLC (p. 6 n.2).[1]

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1. Additionally, the claim for damages incurred because of respondents' unlawful action makes this case not moot. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 442 (1984).

2. *The Granting of a Writ of Certiorari in Burlington.* Respondent BMWE stated in a letter to the Clerk dated October 3, 1986, that "issues raised in Conrail's petition are related to those presented to this Court in [*Burlington*]" and that because the Union already had responded to the *Burlington* petition, the Union waived its right to respond to Conrail's petition. Amicus NRLC urged the court to also grant certiorari in this case, as well as in *Burlington*, and coordinate their handling.

Conrail agrees with amicus NRLC that the Court should hear the instant case with *Burlington*, because the facts and issues presented here are in certain material respects different from those presented in *Burlington*, and reviewing both cases will help the Court deal comprehensively with Railway Labor Act ("RLA") regulation of secondary union pressure: both "stranger" picketing as implicated in both cases, and the related but equally important question of Union-ordered strikes on a neutral carrier in the absence of stranger picketing, presented only in the instant case.[2] The Seventh Circuit's decision in *Burlington* focused only on secondary picketing, *Burlington N. R. R. v. BMWE*, 793 F.2d 795, 798-800 (7th Cir. 1986), and assumed all relevant RLA dispute resolution procedures had been exhausted, *id.* at 799, while noting the continuing viability of this Court's decisions accommodating the anti-injunction provisions of the Norris LaGuardia Act to enforcement of the RLA's dispute resolution procedures. *Id.* at 801. In *Burlington*, the railroads were facing only secondary picketing. *Id.* at 797.

The Conrail facts are quite different. The threatened Union pressure was not only secondary picketing, but also Union-ordered strikes by Conrail employees whom

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2. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (review granted in related cases stemming from the same incident but presenting different questions).

the Union also represents but who were not involved in the Union's exhaustion of the RLA major dispute procedures with Maine Central (Conrail Petition at 4-5, B-1). These threats were acted upon after the Court of Appeals for the Second Circuit stayed the district court's injunction; strikes and picketing broke out across the Conrail system, even in the absence of stranger (Maine Central) pickets (Conrail Petition at 6-7). Thus, the Conrail petition allows the Court to consider whether a union which exhausts RLA dispute resolution procedures with one carrier can order strikes by employees on a neutral carrier with which no RLA dispute procedures have been pursued. As discussed in the petition, the judgment below conflicts with this Court's decisions consistently construing and accommodating the Norris-LaGuardia Act to enforce compliance with the RLA's dispute resolution procedures. (Conrail Petition at 12-14).

3. *Application of the RLA Dispute Resolution Procedures.* Respondents' incorporation here of their reply to the petition in *Burlington* underscores the untenability of their assertion that, once the RLA's major dispute procedures on one carrier are exhausted, a union may engage in unlimited economic warfare because the Federal courts have been taken out of the labor injunction business by the Norris-LaGuardia Act. Brief of Respondents BMWE in Support of the Petition for a Writ of Certiorari in *Burlington*, at 9. As Conrail's petition shows, (Conrail Petition at 12-14) the respondents paint with too broad a brush. The Court consistently has ruled that the nation's labor laws must be read together, to give vitality to the essential values in each, and to promote the peaceful techniques of negotiation, mediation, and arbitration to resolve labor disputes.[3] This was recently reaffirmed

3. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); *Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 38, 40 (1957) *Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570, 585-87 (1971); *United States v. Hutcheson*, 312 U.S. 219 (1941).

in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 709 (1982).

The Court also has recognized consistently that refusal by labor or management to confer and negotiate is a prolific cause of industrial strife, and merits judicial notice. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 n. 11 (1981), citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937). Conferences and negotiation in labor disputes is mandated out of a belief that collective discussions, backed by potential use of economic weapons, will yield decisions that are better for labor and management, and for society as a whole. *First Nat'l Maintenance Corp., supra*, 452 U.S. at 678. The railroad industry's peculiar place in our economy and legal system has warranted a higher standard in this respect than industry generally. *Id.* at 687 n.23.

Respondents would excuse application of these settled principles when a union exhausts its negotiation duty with the primary carrier, even where, as in this case, the Union's secondary pressure goes beyond mere picketing to include strikes of neutral carriers where no conferences have been held. As shown in the petition, Conrail submits that this distinction is without legal foundation. It is of no consequence that the duty under the RLA to confer, negotiate and mediate over the use of some forms of secondary pressure may be "vague," as the Court of Appeals believed (Conrail Petition at A-5). This Court has enforced even vague duties to negotiate where union economic pressure under the RLA would be limited. *Chicago & N.W. R.R. v. United Transp. Union*, 402 U.S. 570, 583 (1971).

Moreover, the drafters of the Norris LaGuardia Act, which does not distinguish among the forms of economic pressure, intended that RLA dispute procedures should be enforced by injunction, *see* 75 Cong. Rec. 5505-04 (1932); *Burlington N. R.R. v. BMWE, supra*, 793 F.2d at 798-99, and the legislative history of the RLA supports

finding a duty to confer over all disputes, whether or not they arise in the proximate employment relationship.[4] Enforcement of this duty is all the more compelling given Congress' admonition against construing the RLA as making all strikes legal once dispute procedures are exhausted, *Texas & N.O. Ry. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 566 n.3 (1930), citing S. Rep. No. 222, 69th Cong., 1st Sess. (1926), and this Court's ruling that the RLA's dispute resolution duties are to be favored over the Norris LaGuardia Act's earlier, more general provisions. *Chicago & N.W.R.R. v. United Transp. Union, supra*, 402 U.S. at 582 n.18.

It is ahistorical to suggest that the RLA dispute procedures do not apply at least to that aspect of the dispute between Conrail and its employees represented by the BMWE; it has long been common practice for labor and management to negotiate over employee responses to stranger disputes that affect the neutral workplace.[5] The railroad's incentives in such conferences are the same as

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4. Compare H.R. Rep. No. 328, 69th Cong., lst Sess. (1926); Hearings before the Sen. Comm. on Interstate & Foreign Commerce on S. 2036, 69th Cong. lst Sess. 44, 67-68, 92 (1926); and Hearings before the House Comm. on Interstate & Foreign Commerce on H.R. 7180, 69th Cong. lst Sess. 67-68, 87-88 (1926) (RLA is industry-wide system of self-government for the resolution of all labor disputes).

5. *See, e.g.*, 2 Collective Bargaining Negot. & Cont. (BNA) 77:l-375 (1986) (discussing frequency of clauses regulating responses to picketing, handling of struck-work, sympathy strikes and related matter). Rail collective bargaining over neutral employee responses to strikes on other railroads dates back at least to 1893. *In re Lennon*, 166 U.S. 548 (1897); *Waterhouse v. Comer*, 55 F. 149 (C.C.W.D. Ga. 1893). *See also Local 1395, IBEW v. NLRB*, No. 85-1164 (D.C. Cir. Aug. 8, 1986) (reviewing "settled principles" of no-strike and picket-line clauses under the National Labor Relations Act); *Trans Int'l Airlines, Inc. v. International Bd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981) (discussing similar issues under the Railway Labor Act); *Northwest Air Lines, Inc. v. Airline Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970) *aff'd*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971) (same).

any employer's: reach an accommodation so as to minimize disruption to its operations. The decision below accepted the Union's formulation that no RLA duties apply to such disputes. Certiorari should be granted to allow the Court to review this important aspect of the RLA's channeling of economic forces, (*Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 30, 41 (1957)) as well as the secondary picketing issues raised in *Burlington* and this case.

## CONCLUSION

For the foregoing reasons, and for the reasons stated both in Conrail's petition and the Amicus Brief of the NRLC, the Writ of Certiorari should be granted, and consideration coordinated with the Court's scheduling of *Burlington Northern Railroad Co. v. BMWE*, No. 86-39.

Respectfully submitted,

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## APPENDIX A

**S.J. Res. 415 99th Cong., 2d Sess. (1986) follows:**

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order no. 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the

parties to accept and apply the recommendations of Emergency Board No. 209, and if such parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

That the following conditions shall apply to the dispute referred to in Executive Order No. 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board No. 209 shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under

the Railway Labor Act (45 U.S.C. 151 et seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3)(A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after 10 days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(1) Within 30 days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed.

No. 86-353

(4)

NOV 26 1986
JOSEPH F. SPANIOL,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

CONSOLIDATED RAIL CORPORATION,

*Petitioner,*

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 27, 1986

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CONSOLIDATED RAIL CORPORATION,

*Petitioner,*

V.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN SUPPORT OF THE PETITION

At issue in this case is whether a rail carrier can enlist the aid of federal courts to break a lawful railway labor strike by enjoining a form of economic self-help plainly permitted under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* Faced with the prospect of peaceful secondary picketing by Respondents Brotherhood of Maintenance of Way Employes, *et al.* ("BMWE"),[1] Petitioner

[1] In addition to BMWE, Petitioner named the following international BMWE officers as defendants below: O.M. Berge, President, W.E. LaRue, Vice-President, J. Dodd, General Chairman, J. Cassese, General Chairman, and P.W. MacQueen, Assistant General Chairman.

Consolidated Rail Corporation ("Conrail") immediately obtained a preliminary injunction prohibiting BMWE from engaging in any secondary conduct directed at Conrail. On appeal, the United States Court of Appeals for the Second Circuit vacated the injunction, holding that the RLA does not prohibit or regulate secondary picketing once the primary parties to an RLA dispute can lawfully engage in self-help and that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, thus deprived the district court of jurisdiction to enjoin BMWE's intended secondary picketing in this case. Over the past several months, four other circuits have considered and uniformly rejected similar carrier attempts to enjoin BMWE's actual or intended secondary picketing in this labor dispute.[2] Every circuit involved in the BMWE litigation has agreed that Congress has not acted to regulate secondary picketing in the railway industry and that the federal courts cannot do so in defiance of the plain language of the Norris-LaGuardia Act. Accordingly, Respondent BMWE respectfully requests that this Court grant the instant Petition and affirm the judgment of the court of appeals.

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[2] *See Brotherhood of Maintenance of Way Employes* v. *Guilford Transp. Indus.*, No. 86-1366 (1st Cir. Oct. 28, 1986) (reproduced in the Appendix hereto at A1-A16); *Norfolk & W. R.R.* v. *Brotherhood of Maintenance of Way Employes*, 795 F.2d 1169 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3115 (U.S. Aug. 1, 1986) (No. 86-175); *Richmond, F. & P. R.R.* v. *Brotherhood of Maintenance of Way Employes*, 795 F.2d 1161 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259 (U.S. Sept. 26, 1986) (No. 86-503); *Central Vermont Ry.* v. *Brotherhood of Maintenance of Way Employes*, 793 F.2d 1298 (D.C. Cir. 1986); *Burlington Northern, Inc.* v. *Brotherhood of Maintenance of Way Employes*, 793 F.2d 795 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 60 (1986) (No. 86-39).

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 792 F.2d 303. The bench opinion of the district court (Pet. App. B1-B8) is unreported.

## JURISDICTION

The court of appeals announced its judgment on June 5, 1986. (Pet. App. A1). No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This case concerns the proper interpretation of certain provisions of the RLA, 45 U.S.C. §§ 152, First and Second, 155, First, 156 and 160, and certain provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104 and 113. These and other pertinent statutory provisions are reprinted as Appendix C to the Petition. (Pet. App. C1-C28).

## STATEMENT OF THE CASE

Respondents adopt the court of appeals' recitation of the factual circumstances surrounding this case. (Pet. App. A2-A3). The labor dispute underlying Conrail's Petition began in April of 1984 when BMWE notified the Maine Central Railway ("MEC") and the Portland Terminal Company ("PT") in accordance with Section 6 of the RLA, 45 U.S.C. § 156, that it sought to negotiate various changes in the existing rates of pay, rules and working conditions governing MEC and PT maintenance of way workers. The MEC and PT are wholly owned subsidiaries of Guilford Transportation Industries ("GTI"). Over the next two

years, BMWE and the MEC-PT fully exhausted the RLA's "major dispute" collective bargaining process, *see* 45 U.S.C. §§ 152, 155-156,[3] without securing agreement on a new labor contract. Once the parties were free to engage in economic self-help under the RLA in March of 1986, BMWE commenced a lawful strike against MEC and PT; in response, the MEC and PT locked out their maintenance of way workers.

To enhance the bargaining position of the MEC and PT strikers, BMWE sought to picket certain secondary rail carriers that, in BMWE's view, provided direct or indirect assistance to the GTI system. (*Id.* at A3). As part of this plan, BMWE notified Conrail by telegram on April 3, 1986, that it intended to engage in peaceful secondary picketing at various Conrail facilities (*id.*) "in order to resolve

[3] To initiate major dispute collective bargaining under the RLA, a party seeking to change rates of pay, rules or working conditions must tender advance written notice under Section 6 of the Act, 45 U.S.C. § 156. The parties must then negotiate over the proposed changes, *id.* § 152, Second, and if conferences fail to resolve the dispute, either party may invoke the mediation services of the National Mediation Board ("NMB"), *id.* § 155, First. If mediation fails, the NMB proffers binding arbitration to the parties, which can occur only if both consent. *Id.* §§ 155, First, 157. An unsuccessful proffer of arbitration releases the parties from mediation and triggers the Act's 30-day "cooling off" period, *id.* § 155, First, after which either party can engage in peaceful economic self-help. *See Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-80 (1969). While the parties exhaust these dispute resolution procedures, neither may unilaterally alter the status quo working conditions involved in the dispute. *See id.*; 45 U.S.C. §§ 152, First, Seventh, 155, First, 156. Congress deliberately designed this major dispute collective bargaining framework as "an almost interminable process." *Detroit & T.S.L.R.R.* v. *United Transp. Union*, 396 U.S. 142, 149 (1969) ("*Shore Line*").

[BMWE's] dispute with the Maine Central Railroad." [4] Conrail promptly obtained a preliminary injunction prohibiting BMWE from engaging in any secondary pressure directed at the carrier. While the district court acknowledged that no RLA provision "expressly" limits secondary picketing in the railway industry (Pet. App. B3), it nonetheless concluded that BMWE could not picket Conrail until it exhausted the RLA's lengthy major dispute bargaining process with *Conrail*, the secondary employer. (*Id.* at B3-B4). The district court further reasoned that the jurisdictional limitations of the Norris-LaGuardia Act were generally inapplicable to railway labor disputes in light of Congress' general intent to avoid the disruption of transportation and to provide for the orderly settlement of disputes under the RLA, *see* 45 U.S.C. § 151a. (*Id.* at B2).

The district court thus concluded what no other court in the 60-year history of the RLA had ever found until this labor dispute, namely that the RLA prohibits a railway union from engaging in peaceful secondary picketing once the union has exhausted major dispute collective bargaining with the primary employer. In vacating the district

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[4] BMWE's threatened secondary conduct on behalf of the MEC and PT strikers thus did not concern any dispute over the rates of pay, rules and working conditions of *Conrail's* employees, some of whom also happen to be represented by a distinct BMWE local group. Accordingly, the record does not support Conrail's assertion (Pet. 13-14) that BMWE's conduct in this dispute constituted *primary* pressure directed at Conrail in violation of the RLA obligations that Conrail's employees owe to Conrail. *See Central Vermont*, 793 F.2d at 1302 n.10 (specifically rejecting this argument under virtually identical factual circumstances). Moreover, nothing in the record or the findings of either court in this case indicates that any BMWE-represented Conrail employees "engaged in their own work stoppage" (Pet. 6) or "attempt[ed] to change working conditions on Conrail" (*id.* at 13). Instead, as the district court (Pet. App. B4) and the court of appeals (*id.* at A3-A5) recognized, this case concerns a classic instance of secondary pressure. *See generally National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 621-26 (1967).

court's injunction, the Second Circuit simply followed this Court's holding that the RLA, unlike the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4), does not purport to regulate or limit secondary conduct during the self-help period. *See Jacksonville Terminal,* 394 U.S. at 386-93. The Second Circuit further concluded that nothing in the language, history or overall structure of the RLA indicates that Congress intended railway unions to exhaust the RLA's lengthy bargaining process with each and every *secondary* employer it seeks to picket. (Pet. App. A4-A5). Accordingly, the Second Circuit held that neither Conrail's "secondary mediation" theory nor the RLA's overall policy aims could override the anti-injunction mandate of the Norris-LaGuardia Act. *See Chicago & N.W. Ry.* v. *United Transp. Union,* 402 U.S. 570, 583-84 (1971) (*"Chicago & North Western"*). Any contrary result, the court concluded, would countenance precisely the type of freewheeling judicial interference into labor relations that the Norris-LaGuardia Act was enacted to prevent. (*Id.* at A4).

On May 15, 1986, immediately after oral argument on the merits of BMWE's appeal, the Second Circuit stayed the district court's injunction, and BMWE commenced peaceful secondary picketing at various Conrail facilities. On May 16, 1986, President Reagan appointed a Presidential Emergency Board pursuant to Section 10 of the RLA, 45 U.S.C. § 160, to investigate and report on BMWE's underlying labor dispute with the MEC and PT. *See* Exec. Order No. 12,557, 51 Fed. Reg. 18,429 (1986). The appointment of an Emergency Board triggered a 60-day cooling off period and required the parties to restore and to maintain the pre-strike status quo working conditions. *See* 45 U.S.C. § 160; *Shore Line,* 396 U.S. at 150-53. The Emergency Board duly reported to the President its

recommendations for the settlement of the underlying BMWE/MEC-PT dispute. When the Section 10 cooling off period expired on July 21, 1986, however, the MEC and PT declined to adopt the recommendations of the Emergency Board and unilaterally imposed substantial cuts in the rates of pay, rules and working conditions of its maintenance of way workers. Rather than resuming its strike, Respondent BMWE instructed its members to continue working while the union sought to negotiate a settlement.

On August 12, 1986, Congress intervened in this dispute to extend the status quo that existed on July 20, 1986 for an additional 60 days until September 18, 1986. *See* H.J. Res. 683, 99th Cong., 2d Sess., 132 Cong. Rec. H5998-99 (daily ed. Aug. 12, 1986). BMWE and the primary carriers again failed to resolve their dispute during this additional cooling off period. Finally, on September 30, 1986, Congress enacted legislation that imposes the Emergency Board's recommendations as the rates of pay, rules and working conditions for the MEC and PT maintenance of way workers. *See* Pub.L.No. 99-431, — Stat. — (1986) (reproduced as Appendix A to Petitioner's Supplemental and Reply Memorandum).[5]

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[5] Public Law No. 99-431 effectively settles the underlying primary dispute between BMWE and the MEC-PT by enacting the recommendations of the Emergency Board as if they were negotiated by the parties under the RLA. (Petitioner's Supplemental and Reply Memorandum at A2-A3). As a result, Conrail no longer faces the threat of future secondary pressure arising out of this particular labor dispute. Conrail has further stipulated to dismiss its damages claim in this case in return for BMWE's agreement to support the instant Petition and to waive any recovery on the injunction bond issued by the district court. Respondents submit that these events have not rendered this case moot, however, since the underlying labor dispute is "capable of repetition, yet evading review." *See Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-27 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

## ARGUMENT

Petitioner contends that the Norris-LaGuardia Act, despite its sweeping language, does not withdraw federal jurisdiction to enjoin secondary picketing (Pet. 9-12) and that the RLA either prohibits or strictly regulates secondary conduct in the railway industry (*id.* at 12-16). Neither of these propositions can claim any support in the relevant statutory language or the decisions of this Court; accordingly, the five circuits involved in the BMWE litigation have unanimously concluded that Congress has permitted railway labor unions to engage in peaceful secondary picketing, without fear of federal court injunctions, during the RLA's self-help period. Because this nationwide litigation has raised important issues of federal railway labor policy, this Court should now grant the Petition, coordinate this case with *Burlington Northern,* and affirm the decision of the Second Circuit.

1. Congress enacted the Norris-LaGuardia Act to "tak[e] the federal courts out of the labor injunction business." *Marine Cooks & Stewards* v. *Panama S.S. Co.,* 362 U.S. 365, 369 (1960). The Act thus withdraws federal jurisdiction to issue injunctive relief in any case "involving or growing out of a labor dispute," 29 U.S.C. §§ 101, 104, and it explicitly extends this jurisdictional bar to any union conduct "[g]iving publicity to the existence of . . . any labor dispute, whether by advertising, speaking, *patrolling,* or by any other method not involving fraud or violence." *Id.* § 104(e) (emphasis added). Congress further defined the "labor disputes" covered by the Act to include *"any* controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Id.* § 113 (emphasis added). Congress specifically intended the federal courts to interpret these provisions broadly and literally. *See Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n,* 457 U.S. 702, 711-12

(1982) (*"Bulk Terminals"*); S. Rep. No. 163, 72d Cong., 1st Sess. 25 (1932).

Despite the clear applicability of these provisions to secondary picketing, Conrail maintains that secondary pressure does not "involve or grow out of a labor dispute" whenever a federal judge determines that the union's conduct does not further its legitimate "economic self-interest." (Pet. 10-11). Neither the plain language of the statute, *see* 29 U.S.C. § 113, nor its thoroughly-documented history, *see, e.g., Bulk Terminals,* 457 U.S. at 711-20, provides even the slightest support for this ill-defined and judge-made limitation on the Norris-LaGuardia Act. Accordingly, at least six circuits—including every circuit involved in the BMWE litigation—have emphatically rejected any exception to the Norris-LaGuardia Act based on judicial second-guessing of employee "self-interest." [6]

Given the uniform rejection of this economic self-interest analysis throughout the BMWE litigation, Conrail cannot plausibly maintain (Pet. 9-12) that the earlier decisions of the Fifth Circuit, *see Brotherhood of R.R. Trainmen* v. *Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court,* 385 U.S. 20 (1966), and the Eighth Circuit, *see Ashley, D. & N. Ry.* v. *United Transp. Union,* 625 F.2d 1357 (8th Cir. 1980) (*"Ashley, Drew"*), retain vitality. The Fifth Circuit, for example, did not adopt the restrictive construction of the Act that Conrail advances before this Court. Instead, the Fifth Circuit concluded that secondary picketing fell within the literal and common sense reach of the Norris-LaGuardia Act, *see Atlantic Coast*

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[6] The First, Second, Fourth, Seventh and District of Columbia Circuits rejected this argument in cases growing out of BMWE's dispute with the MEC and PT. *See supra* note 2. The Ninth Circuit had earlier rejected any economic self-interest exception to the Norris-LaGuardia Act in a non-railroad case. *See Smith's Management Corp.* v. *International Bhd. of Elec. Workers,* 737 F.2d 788, 790-92 (9th Cir. 1984).

*Line*, 362 F.2d at 653-54, and that it also satisfied any conceivable limitation on "labor disputes" subject to the Act because secondary picketing is obviously related to the legitimate collective bargaining interests of both the primary and secondary employees, *see id.* at 654-55. While the Eighth Circuit later misconstrued this reasoning to render the Norris-LaGuardia Act inapplicable to secondary picketing unless the interests of the primary and secondary *employer* are "substantially aligned," *see Ashley, Drew*, 625 F.2d at 1362-67, that rationale is now thoroughly repudiated [7] and no longer creates any genuine conflict among the circuits.

In any event, the supposed conflict created by *Atlantic Coast Line* and *Ashley, Drew* is plainly foreclosed by this Court's consistent interpretation of the Norris-LaGuardia Act. As the Court has often explained, Congress deliberately adopted the broadest possible definition of the "labor disputes" protected by the Act precisely to prevent a labor jurisprudence dominated by judicial inquiry into the legitimacy of union objectives. *See, e.g., Bulk Terminals*, 457 U.S. at 711-20; *Marine Cooks*, 362 U.S. at 369.

> Congress made the definition [of a "labor dispute"] broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted.

*Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 336 (1960). For this very reason, the Court in *Bulk Terminals* squarely held that the Norris-LaGuardia Act prohibits judicial assessment of union objectives and

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[7] *See, e.g., Richmond*, 795 F.2d at 1166-67; *Central Vermont*, 793 F.2d at 1299-1301; *Burlington Northern*, 793 F.2d at 805-07; *Smith's Management*, 737 F.2d at 790-92.

explicitly rejected any judge-made "economic self-interest" limitation on the Act's coverage. *See Bulk Terminals,* 452 U.S. at 713-15.[8] Here, too, Conrail's construction of the Norris-LaGuardia Act would impermissibly "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed the Act." *Id.* at 719.

2. The clear applicability of the Norris-LaGuardia Act to this dispute is fatal to Conrail's attempt to enjoin BMWE's secondary picketing. While the Court has recognized the need to accommodate the Norris-LaGuardia Act to permit injunctive enforcement of explicit, positive RLA commands (Pet. 12-13),[9] the RLA contains no provision that even remotely prohibits or limits secondary conduct once the parties are free to engage in self-help. To the contrary, the RLA plainly permits railway unions "to employ the full range of whatever peaceful economic power they can muster" once the parties have exhausted the RLA's lengthy major dispute bargaining procedure. *Jacksonville Terminal,* 394 U.S. at 392. Congress sanctioned this wide-

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[8] *Bulk Terminals* also clearly rejected any "economic self-interest" exception to the Norris-LaGuardia Act "in cases where the disputants do not stand in the relationship of employer and employee." *Bulk Terminals,* 457 U.S. at 714 (citing *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U.S. 552 (1938)).

[9] In particular, the Court has recognized federal jurisdiction to enjoin RLA strikes over arbitrable minor disputes, *see Brotherhood of R.R. Trainmen* v. *Chicago River & I.R.R.,* 353 U.S. 30, 39-42 (1957), and to enjoin either party from violating a central, express RLA provision, *see Virginian Ry.* v. *System Fed'n No. 40,* 300 U.S. 515, 562-63 (1937). However, the Court has expressly limited this accommodation principle to "narrowly defined situations" involving specific RLA obligations. *Bulk Terminals,* 457 U.S. at 720. The Court has likewise cautioned against judicial use of vague RLA policies as "a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place." *Chicago & North Western,* 402 U.S. at 583 (footnote omitted).

ranging use of economic self-help despite the general dispute-resolution aims of the RLA and despite the general responsibilities of rail carriers to provide transportation services. *See id.* at 377-78; *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 244-45 (1966).

When Congress amended the NLRA in 1947 to prohibit certain forms of secondary conduct by non-railway unions,[10] moreover, it specifically considered and rejected proposals to ban secondary picketing under the RLA as well. *See Jacksonville Terminal,* 394 U.S. at 376 n.10 (quoting 93 Cong. Rec. 6498 (1947) (statement of Sen. Taft)). In *Jacksonville Terminal,* the Court thus concluded that the states could not prohibit or regulate secondary picketing in the railway industry because Congress has chosen to protect such conduct under the RLA. *Id.* at 392-93. As the Court explained:

> Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, . . . it might well decide . . . that this field requires extraordinary treatment of some sort. Certainly, it is for the Congress, and not the courts, to strike the balance "between the uncontrolled power of management and labor to further their respective interests." The Congress has not yet done so.

*Id.* at 392 (citations omitted) (quoting *Local 1976, United Bhd. of Carpenters* v. *NLRB,* 357 U.S. 93, 100 (1958)).

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[10] *See* Labor-Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136, 140-41 (1947) (codified as amended at 29 U.S.C. § 158(b)(4)). The Taft-Hartley Act empowers only the National Labor Relations Board, not private employers, to petition federal courts for injunctive relief against the prohibited forms of secondary conduct. *See* 29 U.S.C. §§ 160(j)-(l); *Bulk Terminals,* 457 U.S. at 718-19.

Accordingly, no federal appellate court has ever concluded that the RLA restricts secondary picketing during the self-help period.[11]

Conrail nonetheless contends that the RLA does prohibit secondary picketing in the self help period unless and until the union exhausts NMB mediation with the relevant *secondary* carrier (Pet. 13) under the RLA's "miscellaneous" mediation provision. *See* 45 U.S.C. § 155, First (b). The RLA itself, however, plainly limits any such bargaining obligation to "carriers and the employees *thereof*," *id.* § 152, First (emphasis added),[12] and Conrail cannot point to any support in the RLA's legislative history or overall structure for this unprecedented and unworkable "secondary mediation" theory. The suggestion that federal courts should construe the overall dispute-resolution aims of the RLA to prohibit secondary picketing (Amicus Br. 7-9) is equally devoid of any statutory or historical basis. Congress specifically enacted Section 10 of the RLA—which provides for the creation of an Emergency Board and the suspension of self-help—as the exclusive RLA remedy for railway labor disputes that threaten to disrupt

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[11] In *Ashley, Drew,* the Eighth Circuit relied on the general policy provisions of the Interstate Commerce Act, 49 U.S.C. § 11101(a), to enjoin secondary picketing by a railway union. *See Ashley, Drew,* 625 F.2d at 1369-71. This Court has clearly held, however, that "unlawfulness under *nonlabor* legislation [does] not remove the restrictions of the Norris-LaGuardia Act upon the jurisdiction of the federal courts." *Telegraphers,* 362 U.S. at 339 n.15 (emphasis added; citations omitted). Accordingly, Conrail's repeated invocation of the Interstate Commerce Act (Pet. 2, 10 n.7, 14) is irrelevant to the jurisdiction of federal courts to enjoin secondary picketing in the railway industry.

[12] Indeed, the RLA's central procedures and obligations are all specifically designed to regulate the relationship between a carrier and *its* employees. *See, e.g.,* 45 U.S.C. § 152, Second (direct negotiations); *id.* § 157 (arbitration); id. § 160 (Emergency Board procedures).

essential transportation services. *See* 45 U.S.C. § 160; *Shore Line*, 396 U.S. at 150-53. The RLA does not permit federal courts to impose *additional* non-statutory limits on union self-help whenever a federal judge determines that such relief would further national transportation interests.

At bottom, Conrail's entire position in this case reflects nothing more than Petitioner's incredulity that Congress has chosen to prohibit secondary picketing under the NLRA, but not under RLA. (Pet. 15-16). Congress has done precisely that, however, and Conrail cannot ask the federal courts to overturn that congressional choice by ignoring the plain language of both the RLA and the Norris-LaGuardia Act.

## CONCLUSION

For these reasons, the Court should grant the Petition and affirm the decision of the court of appeals.

Respectfully submitted,

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November 27, 1986

# APPENDIX

## UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1366

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

*Plaintiff, Appellee,*

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,

*Defendants, Appellees.*

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DELAWARE AND HUDSON RAILWAY COMPANY,

*Defendant, Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

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Before: Campbell, *Chief Judge,*
Bownes and Torruella, *Circuit Judges.*

October 28, 1986

TORRUELLA, *Circuit Judge.* The principal issue presented by this appeal is whether the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA), overrides the provisions of the Norris-

LaGuardia Act, 21 U.S.C. § 101 *et seq.*, to the extent of permitting the enjoining of secondary picketing by a labor organization that has exhausted the procedures established by the RLA for resolution of a "major" dispute [1] with a primary carrier-employer.[2] Although this is a question of first impression in this circuit, we are the fortunate beneficiaries of prior consideration of this query by several of the courts of appeal. *See Burlington Northern R. Co.* v. *B.M.W.E.*, 793 F.2d 795 (7th Cir. 1986) (cannot enjoin secondary boycott); *Central Vermont Ry.* v. *Broth. of Maintenance*, 793 F.2d 1298 (D.C. Cir. 1986) (cannot enjoin secondary picketing); *Richmond, Fredericksburg and Potomac R.R. Co.* v. *B.M.W.E.*, No. 3544 (4th Cir., July 11, 1986) (same). *But see, Ashley, Drew and Northern Ry.* v. *UTU*, 625 F.2d 1357 (8th Cir. 1980) (secondary picketing may be enjoined when the interests of the party being picketed are not "substantially aligned" with those of the struck employer); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966) (same). *Cf. Consolidated Rail Corp.* v. *Broth. of Maintenance*, 792 F.2d 303 (2d ir. 1986) (no need to exhaust RLA remedies before picketing secondary employer).

We affirm, on jurisdictional grounds, the district court's refusal to enjoin such conduct. 29 U.S.C. § 101.

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[1] In RLA parlance a "major" dispute arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *See Elgin, J. & E. Ry.* v. *Burtey*, 325 U.S. 711, 722-28 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is concerned with the resolution of grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), 45 U.S.C. § 153.

[2] We are not deciding whether secondary activity is enjoinable prior to exhaustion of RLA dispute resolution procedures with the primary carrier employer.

## *Appendix*

## I

The appellee in this case, the Brotherhood of Maintenance of Way Employees (BMWE), is a labor organization representing a bargaining unit of maintenance of way employees of the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (referred collectively hereafter as the Maine Central). Since April, 1984, BMWE and Maine Central have been engaged in the negotiation of changes to their collective bargaining agreement, but have reached no agreement. The parties exhausted the RLA procedures for "major" dispute resolution [3] and thereafter, on March 3, 1986, the BMWE commenced a strike against the primary carrier-employer, Maine Central. Maine Central attempted to continue operating with supervisory personnel and replacements,[4] which in turn led to the escalation of hostilities by the BMWE. The union extended its picketing to other carriers not directly involved in the dispute with Maine Central. The object of this secondary picketing was to indirectly pressure Maine Central to give in to the BMWE's bargaining demands.

The pickets were initially extended to the Boston & Maine Railroad (B & M), which, like the Maine Central, is owned by Guilford Transportation Industries, Inc. (Guilford), a holding company. B & M interconnects with the Maine Central. Thereafter BMWE also picketed Delaware and Hudson Railway Company (D & H), another Guilford

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[3] 45 U.S.C. §§ 155-160. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[4] *See Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238 (1966).

subsidiary, which however is non-connecting.[5] Additional non-affiliated and non-connecting railroads were picketed by BMWE, also with the object of exerting pressure on Maine Central.

Various suits were commenced throughout the country by the several secondary carriers in an attempt to stop the BMWE's secondary picketing. All of these suits, despite some initial successes in the district courts, were ultimately unsuccessful. The courts of appeal held that the secondary picketing was not prohibited by the RLA and could not be enjoined because of the Norris-LaGuardia Act. *See Burlington Northern R. Co., supra; Central Vermont Ry., supra; Richmond, Fredericksburg and Potomac R.R. Co., supra.*

In the meantime, in an apparent attempt to forestall action by the carriers elsewhere, the BMWE filed a declaratory judgment suit in the U.S. District Court in Maine against Guilford, B & M, and D & H, seeking, among other things, a declaration to the effect that its secondary picketing of B & M and D & H was protected activity under the Constitution and the RLA. The carrier-defendants counter claimed and sought injunctive relief to prohibit the secondary activity.

The district court, after hearing D & H's motion for preliminary injunction, ruled that all that was required for the Norris-LaGuardia Act to apply was that there be a labor dispute and that the union continue to act as a labor organization. Finding that both conditions existed

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[5] Appellee Guilford in its brief raises questions regarding the right to picket these affiliates because of its dispute with Maine Central. We need not enter this quagmire as the district court's decision is not based on the corporate affiliation of appellants to Maine Central, but rather assumes *arguendo* its immateriality. We shall do likewise.

in this case, the court in effect concluded that it was immaterial whether or not the interests of D & H and Maine Central were "substantially aligned." [6] Injunctive relief was denied and this appeal ensued.

II

In 1881 Oliver Wendell Holmes, in his now famous essay, stated that "[t]he life of the law has not been logic; it has been experience." [7] The present situation is a case in point, as much of appellant's argument is based on its perception that it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation. What Congress may or may not have done is explainable less in terms of logic, than by recounting how this legislation developed. Thus, the issue presented by this case cannot be answered, and the answer cannot be properly supported, without consideration of the events leading up to the passage of the RLA, and subsequent legislation.[8]

At common law, all strikes and pickets, whether primary or secondary, were considered illegal combinations or conspiracies. In the early 18th century most of this activity was subjected to criminal sanctions,[9] an attitude that pre-

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[6] *See Ashley, Drew and Northern Ry., supra; Brotherhood of Railroad Trainmen, supra.*

[7] Holmes, *The Common Law*, p. 1 (Howe, ed., 1963).

[8] *See generally* Cox, Bok and Gorman, *Labor Law*, 9th ed. (1981); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958); Gregory, *Labor and the Law*, 2d ed. (1958); Frankfurter & Greene, *The Labor Injunction* (1930).

[9] *See, e.g., Commonwealth* v. *Pullis*, Philadelphia Mayor's Ct., 1806.

vailed until *Commonwealth* v. *Hunt* [10] ruled that collective labor activity was not a criminal conspiracy. Thereafter, the civil injunction became the principal weapon by which strikes and picketing were suppressed. In issuing injunctive relief against these concerted activities, courts relied on common law principles of nuisance, trespass and interference with advantageous relationships.[11]

Two views soon emerged, both of which were represented in the leading Massachusetts case of *Vegelahn* v. *Gunter*.[12] In this case the majority held that peaceful picketing to obtain higher wages was an unlawful means of securing a lawful objective. Judge Holmes dissented, arguing that if the object of the activity was lawful, any non-violent means was lawful, even against "third persons." In this stage of development of the law of striking and picketing, no distinction appears to have been drawn between primary and secondary activity.[13]

In 1908, the Supreme Court decided the *Danbury Hatters* case,[14] specifically ruling that both primary and secondary boycotts were actionable in damages pursuant to Section 7 of the Sherman Act.[15] Thereafter the use of the federal courts to enjoin labor disputes became even more prevalent and led to the passage of the Clayton Act in 1914.[16]

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[10] 45 Mass. (4 Met.) 111 (1842).

[11] *See In re Debs*, 158 U.S. 564 (1895).

[12] 167 Mass. 92 (1896).

[13] *See Plant* v. *Woods*, 176 Mass. 492 (1900), (Holmes, J. dissenting).

[14] *Loewe* v. *Lawlor*, 208 U.S. 274 (1908).

[15] July 2, 1890, c. 647, 26 Stat. 209.

[16] 15 U.S.C. §§ 12 *et seq.*

*Appendix*

In enacting Section 20 of the Clayton Act,[17] Congress attempted to narrow the jurisdiction of the federal courts by prohibiting injunctions in disputes concerning terms and conditions of employment. Purportedly, the only exception was equitable relief necessary to prevent irreparable injury to property or to a property right. The Supreme Court, however, in *Duplex Printing Press Co.* v. *Deering*,[18] narrowed Section 20's prohibition on injunctions to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts. Thus secondary activity was held to be enjoinable even after Section 20 was enacted.

Against this background Congress passed the RLA in 1926.[19] Although limited at that time to the railroad industry,[20] the RLA was the first major Congressional recognition of employees' right to organize and to negotiate with employers. The RLA made no mention of secondary boycotts. There are, however, various indications from the text of the statute that the rights and procedures established thereunder were only intended to regulate the relationships between carriers and *their* employees. For example, Section 1, Fifth of the RLA[21] defines the term "employee" as including "every person in the service of a carrier (subject to *its* continuing authority to supervise and direct the manner of rendition of his service)" (emphasis supplied). Several other sections refer to the carrier(s) and "*its* or

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[17] 29 U.S.C. § 52.

[18] 254 U.S. 443 (1921).

[19] 44 Stat. 577.

[20] It was amended in 1936 to include the airline industry. *See* 45 U.S.C. §§ 181-185.

[21] 45 U.S.C. § 151, Fifth.

their employees." [22] The use of the defined term "employee" throughout the statute strongly suggests that a classical employee-employer relationship was contemplated by Congress.[23]

In our search of the legislative history of the original RLA and its subsequent amendments,[24] we have been unable to find any expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place. It [sic] the face of this legislative silence, the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation.

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[22] Emphasis supplied. *E.g., Section* 2 (45 U.S.C. § 152) (General duties of carriers and employees to settle disputes), Section 7 (45 U.S.C. § 157) (Arbitration), and Section 10 (45 U.S.C. § 160) (Emergency Board).

[23] *E.g.*, Section 3 (45 U.S.C. § 153) (National Railroad Adjustment Board, referred to in the original act as "Boards of Adjustment"), Section 5 (45 U.S.C. § 155) (Mediation Board, Section 4 of original act), and Section 6 (45 U.S.C. § 156) (procedure in changing rates of pay, rules and working conditions). We note in passing that when the RLA was amended in 1936 to include carriers by air, 49 Stat. 1189, similar language was adopted by Congress, *e.g.*, Section 201 ("air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."). 45 U.S.C. § 181. Emphasis supplied. *See also* Sections 204 (45 U.S.C. § 184) and 205 (45 U.S.C. § 185).

[24] June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, 48 Stat. 1185; June 25, 1936, c. 806, 49 Stat. 1921; Aug. 13, 1940, c. 664, 54 Stat. 785, 786; June 25, 1948, c. 646, 62 Stat. 991; May 24, 1949, c. 139, 63 Stat. 107.

*Appendix*

The statements of Congressmen Merritt and Berkeley,[25] relied upon by appellants are at best ambiguous, as is that of D.B. Robertson, President of the Brotherhood of Locomotive Firemen & Enginemen.[26] The language referred to by appellants, presently contained in 45 U.S.C. § 151a(1), to the effect that the RLA prescribes procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules or working conditions," [27] was not in the RLA as enacted in 1926. *See* 44 Stat. 577. In any event, even as it reads today, we must take this language in the light of the definition of the term "employee" previously indicated. That definition establishes that the RLA seeks to regulate *only* the relationships and disputes arising between carriers and those persons "subject to the continuing authority [of the carrier] to supervise and direct the manner of rendition of his services," [28] *e.g.*, persons in an employer-employee relationship.

Appellants' best argument would have been that the Supreme Court's decision in *Duplex Printing* survived the RLA's passage in 1926, thus making it illegal to have a secondary boycott even after its enactment. It is apparent why appellants have not pressed this point, however.

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[25] 67 Cong. Rec. 4568; 4519 (1926). "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity [would result]." (Congressman Merritt, 67 Cong. Rec. 4568 (1926)).

[26] The RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926).

[27] Emphasis supplied by appellants in their brief.

[28] 45 U.S.C. § 151, Fifth.

In 1932, Congress enacted the Norris-LaGuardia Act.[29] Section 1 thereof unequivocably states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[30]

Section 2 proceeds to state that in the interpretation of this statute and "in determining the jurisdiction and authority of the courts of the United States . . . [it is] the public policy of the United States . . . that [employees] shall be free from the interference, restraint, or coercion of employees of labor . . . in [the effectuation of] concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31] In labor parlance, "concerted activities," of course, includes strikes and secondary boycotts. *See Jacksonville Bulk Terminals, Inc., supra.*

The Norris-LaGuardia Act is anything but vague regarding acts that are *not* subject to the equitable jurisdiction of the courts of the United States. Section 4 specifically deprives federal courts of power to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit the following acts:

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[29] 47 Stat. 70, 29 U.S.C. §§ 101-115.

[30] 29 U.S.C. § 101.

[31] 29 U.S.C. § 102.

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.[32]

This is exactly the conduct that appellants seeks to enjoin.

It is Section 13, however, which is most damaging to appellants' contentions. It defines the term "labor dispute" as including:

> *any controversy* concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[33]

This provision was specifically enacted to overrule the Supreme Court's decision in *Duplex Printing. See H.R. Rep. No. 669,* 72d Cong., 1st Sess. 10 (1932); *Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 703 (1965) (Goldberg, J., concurring); *United States* v. *Hutcheson,* 312 U.S. 219, 229-30 (1941); Cox, Bok & Gorman, *Labor Law, supra,* at 55-60. Furthermore, it was intended by Congress that the provision be broadly interpreted. *See Corporate Printing Co., Inc.* v. *New York Typographical Union No. 6,* 555 F.2d 18 (2d Cir. 1977). It has thus

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[32] 29 U.S.C. § 104(e), (i).

[33] 29 U.S.C. § 113(c). Emphasis supplied.

been regarded as a limitation against enjoining even controversies whose genesis is political protest, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n,* 457 U.S. 702 (1982) (refusal to handle ships of the U.S.S.R. in protest of invasion of Afghanistan), and to cover intraunion disputes. *See Bodecker* v. *Local Union No. P-46,* 640 F.2d 182 (6th Cir. 1983).

More on point, however, it is unquestioned that since its enactment, this section, together with the specific language of other conditions previously pointed out, deprived federal courts of *any* jurisdiction to enjoin secondary boycotts. *See Iron Workers* v. *Pauly Jail Bldg. Co.,* 118 F.2d 615, 620 (8th Cir.), *cert. denied,* 314 U.S. 639 (1941); *Wilson & Co.* v. *Birl,* 105 F.2d 948, 952 (3d Cir. 1939); *Cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437 (1948) (where the picketing is not related to a labor dispute the activity may be enjoined). Although the decided cases on the issue of secondary boycotts do not include any carriers or labor organizations covered by the RLA, the language of these decisions places great reliance on the all inclusive language of the Norris-LaGuardia Act prohibition. This reliance is particularly relevant when we consider that the statute was enacted to deal with a specific issue, to control the issuance of injunctions by federal courts in cases of labor disputes, rather than the broader purposes of a general labor law such as the RLA.

Appellants again look to the legislative history of the Norris-LaGuardia Act for support for their contention that secondary boycotts in the railway industry were excluded from its coverage. Congressman Beck proposed an amendment which would have excluded labor disputes in the railroad industry from the proscription of Section 4 of the

[sic—probably should be Norris-LaGuardia Act].[34] In opposition, Congressman LaGuardia stated that this amendment was unnecessary because the RLA "provided a machinery . . . for settling labor disputes." [35] The amendment was then defeated. We cannot agree that this incidental exchange is sufficient to defeat the specific and encompassing exclusion of the Norris-LaGuardia Act. The exchange means only that the RLA establishes the procedures which must be followed prior to any strike activity taking place. Once they are exhausted, however, both parties, may resort to self-help, as they have done in this case. However, if they engage in self-help activities before exhaustion of the machinery established for dispute resolution, the action may be enjoined notwithstanding the Norris-LaGuardia Act. It is only because there is such machinery that the Supreme Court has carved out exceptions to the statute. *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) ("minor" disputes to be submitted to Adjustment Board for compulsory arbitration); *Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) ("major" disputes). *Cf. Boys' Market, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (injunction available to enforce contractual no strike clause if the grievance subject to arbitration). In this case, however, the parties have exhausted the pre-self-help dispute resolution procedures. They are thus free to engage in peaceful conduct to seek improvement of their respective positions.

Congress has not been reticent to prohibit secondary boycotts and to provide injunctive relief against them when it has considered it advisable.

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[34] 75 Cong. Rec. 5503 (Mar. 8, 1932).

[35] *Id.* at 5499.

In 1935 it enacted the National Labor Relations Act (Wagner Act), 49 Stat. 449, whereby the organizational rights of employees were generally recognized throughout the industrial and business sectors of the United States. The statute provided for unfair labor practices by employers, but contained no such prohibitions against labor organizations. Furthermore, the Act did not restrict secondary boycotts or picketing. *See Allen Brudely Co.* v. *Local 3, IBEW*, 325 F.2d 503 (2d Cir. 1942). It was not until the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 140, that Congress mentioned, and thereafter prohibited, secondary boycotts. *See* 29 U.S.C. 158(b)(4).[36] *See generally* Millis & Brown, *From the Wagner Act to Taft Hartley* (1950); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1 (1947). When Congress perceived various loop holes in that statute it proceeded to enact the Landum-Griffin [sic] Act in 1959, 73 Stat. 525, 542, 545, and thus prohibited "hot cargo" clauses and similar conduct. 29 U.S.C. § 158(e).

It is significant not only that Congress has known how to specifically enact prohibitions against secondary activity, but also that Congress has not left to private enforcement the enjoining of secondary conduct. Such powers, when permitted, have *only* been granted to a designated federal agency, the National Labor Relations Board. *See* 29 U.S.C. § 160.

From all of the above we conclude that there are indeed some areas in the field of railroad labor relations that have

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[36] Interestingly enough, during the debates for the enactment of the Taft-Hartley Act, Senator Taft was of the view that secondary boycotts by railroad employees were protected by the RLA. 93 Cong. Rec. 6498, 2 Legislative History of the Labor were Management Relations Act, 1947, p. 1571.

been left unregulated. Whether this state of affairs should be allowed to remain is an affair of state, not a matter for the courts to correct. By now there should be no question that courts are not constitutionally empowered to enact legislation.

We should keep in mind that the Supreme Court stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1968), a case in which the issues were closely related to the matters before us:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions or social and economic policy. And the common law of labor relation has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting that those separating primary from "secondary" activities.

Citations omitted.

Appellant should seek relief not before this Court, but before Congress.

III

Lastly, appellants argue that the Norris-LaGuardia Act must be read in context with the Interstate Commerce Act, 49 U.S.C. § 11101 *et seq.*, which establishes a national policy in favor of providing uninterrupted rail transportation. This policy, appellants claim, as expressed in 49 U.S.C. §§ 11101(a) ("A common carrier . . . shall provide the transportation or service on reasonable request") and 10741 (prohibitions against discrimination by common carrier), permits the issuance of an injunction to prevent

secondary picketing. To say the least, this argument is far-fetched.

It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute. *See* 49 U.S.C. §§ 10101, 10101a. It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory reasons,[37] there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure*.[38] If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. Obviously, such an argument cannot be seriously made.

We thus agree with our brethern [sic] of the Seventh Circuit that the Interstate Commerce Act does not provide leave to ignore the proscriptions of the Norris-LaGuardia Act. *Burlington Northern R. Co., supra,* 793 F.2d at 800. *See also Order of Railroad Telegraphics* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 339 (1960); *Milk Wagon Drivers' Union* v. *Lake Valley Co.,* 311 U.S. 91, 103 (1940).

The order of the district court denying injunctive relief is *affirmed.*

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[37] Just as it could not at common law. *See American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.,* 387 U.S. 397, 406 (1967).

[38] *See Mishara Constr. Co.* v. *Transit-Mixed Concrete Corp.,* 310 N.E. 2d 363 (Mass. 1974) (recognizing that when labor dispute is unexpected and occurrence of the dispute presents unusual difficulty "the excuse of impracticability may well be applicable").